

*United States Court of Appeals  
for the Second Circuit*



**APPENDIX**



75-2017

Temp. Docket No. 74-8370

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PLS

United States Court of Appeals  
FOR THE SECOND CIRCUIT

UNITED STATES *ex rel.* TIMOTHY MORGAN,  
Petitioner-Appellee,  
*against*

ROBERT HENDERSON, Superintendent, Auburn  
Correctional Facility,  
*Respondent-Appellant.*

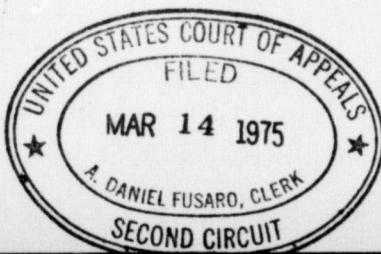
APPENDIX

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Memorandum Decision and Order, October 29, 1974.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel.  
TIMOTHY G. MORGAN,

Relator,

-vs-

73-CV-440

ROBERT J. HENDERSON, Superintendent,  
Auburn Correctional Facility,

Respondent.

EDMUND PORT, Judge

APPEARANCES:

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144 Genesee Street  
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Attorney for Relator

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of New York  
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JOSEPH R. CASTELLANI, ESQ.  
Assistant Attorney General  
Of Counsel

Memorandum-Decision and Order

I originally dismissed the above captioned petition by Memorandum-Decision and Order dated September 26, 1973. Upon consideration of a motion made by the relator for a certificate of probable cause, for leave to proceed in forma pauperis and for the assignment of counsel, the United States Court of Appeals for the Second Circuit, by order dated December 12, 1973, granted a certificate of probable cause and reversed my judgment dismissing the petition and remanded the case "to conduct an evidentiary hearing on the issues raised by petitioner, including whether, he was aware that intent was an essential element of the crime and was advised of the scope of the punishment that might be imposed." The mandate of the Court of Appeals was filed in the

## Memorandum Decision and Order, October 29, 1974.

office of the Clerk of this court on December 27, 1973. Thereafter, counsel was assigned to relator, an evidentiary hearing held on May 3, 1974 at Auburn, New York, and the matter briefed by the parties hereto. The case is now submitted for decision.

The relator alleges that he plead guilty in the Fulton County Supreme Court on June 8, 1965, to Murder 2nd degree and was sentenced on June 15, 1965, to a term of 25 years to life; no appeal was taken. Relator petitioned for a writ of error coram nobis in the Fulton County Supreme Court on the ground that the trial court, at the plea taking, failed to ascertain whether or not there was a factual basis for the plea; specifically, relator alleged that the court made no attempt to ascertain whether or not the essential element of "a design to effect the death of the person killed" was present. Relator also alleged that the plea was not made with an understanding of the nature of the charges or the consequences of the plea, due, in part, to his I.Q. which is alleged to be between 68-75. The state writ was denied without a hearing on June 3, 1971; the Appellate Division affirmed without opinion. People v. Morgan, 38 A.D.2d 1012 (3rd Dept. 1972). Leave to appeal to the Court of Appeals was denied on July 6, 1972. Thereafter, the relator commenced the instant proceeding in this court which was originally dismissed by me and reversed and remanded by the Court of Appeals as aforesaid.

THE HEARING

The hearing was held on May 3, 1974 at Auburn, New York; the petitioner introduced the sentencing and arraignment minutes, and also testified on his own behalf. Petitioner testified that he plead to Murder 2nd degree with the knowledge that he was originally charged with Murder 1st degree; he further testified that he understood that if

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he had plead guilty as charged he could have received a sentence of life imprisonment. He testified that at no time did anyone explain to him the elements of either first or second degree Murder, and that he would not have plead guilty to second degree Murder if he had known or had been informed that an essential element of that offense was an intent to cause the death or a design to effect the death of the victim, as he had no such intent. He further claimed that he would not have plead guilty to Murder 2nd degree if he had known or had been informed that he could have received the sentence that was imposed upon him; he testified that he had expected a lesser sentence than that imposed.

The principle witness for the respondent was petitioner's assigned co-counsel, Floyd J. Reinhart, Esq.<sup>1</sup> Mr. Reinhart testified that he had engaged in plea bargaining with the District Attorney and had hoped to obtain for petitioner the privilege of pleading guilty to Manslaughter; however, the District Attorney refused to reduce the charge to that extent and insisted upon a plea to Murder 2nd degree. Mr. Reinhart candidly stated that he had never discussed the elements of either first or second degree Murder with the petitioner, and that in his discussions with the petitioner he distinguished the two crimes merely by the type of punishment that could be imposed upon a conviction for the same. Attorney Reinhart did testify that during the period of plea bargaining and prior to the entry of the plea of guilty, he did inform the petitioner that if he plead to Murder 2nd degree he would receive (and which petitioner ultimately received) a sentence of 25 years to life imprisonment; this information was conveyed to the petitioner at various conferences which were also attended by members

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1. Who is an experienced, highly-qualified lawyer in criminal and trial practice.

## Memorandum Decision and Order, October 29, 1974.

of petitioner's family.

Robert P. Best, Esq., petitioner's other assigned co-counsel, also testified at the hearing; his testimony corroborated the testimony of Mr. Reinhart and, in addition, he testified that he thought, but could not be certain, that he informed petitioner, in the form of a hypothetical case, of the differences between Murder 1st degree, Murder 2nd degree, and Manslaughter. However, upon examining and searching his file he was unable to find any notes substantiating such a conversation with the petitioner.

THE LAW

Boykin v. Alabama, 395 U.S. 238 (1969) is not applicable to the instant case. See, e.g., United States ex rel. Rogers v. Adams, 455 F.2d 1372 (2d Cir. 1970). The standard to be applied to the plea of guilty herein is whether under all the circumstances the petitioner made a reasoned choice, voluntarily, after proper advice, and with a full understanding of the consequences. See United States ex rel. Codarre v. Gilligan, 363 F.2d 961, 964 (2d Cir. 1966).

DISCUSSION

There are two contentions made by petitioner herein:

(1) That he was never told or advised by counsel or the court of the maximum punishment to which he was subjecting himself by pleading guilty to Murder 2nd degree, and that if he had been told or had known that he would be sentenced to 25 years to life he would not have plead guilty; and

(2) That he was never informed of the elements of the crime to which he plead guilty; specifically, he was not aware that an intent to cause death or a design to effect death had to be

## Memorandum Decision and Order, October 29, 1974.

present and proved in order to convict him of Murder 2nd degree, and that if he had been so informed, he would not have plead guilty.

In connection with petitioner's first claim, I find that the petitioner knew and had been advised that upon his plea to Murder 2nd degree he would be sentenced to a term of 25 years to life; this was, in fact, the sentence imposed upon petitioner after his plea. In this connection, I credit the testimony of petitioner's two co-counsel on the hearing herein and discredit the petitioner's testimony in this regard. Based upon this finding, I cannot agree that the petitioner's plea was entered in ignorance of its direct consequences insofar as the maximum sentence was concerned; therefore, petitioner's due process rights were not violated in this regard. Cf. United States ex rel. Leeson v. Damon, 496 F.2d 718 (2d Cir. 1974). Accordingly, petitioner's first claim is without foundation.

In connection with petitioner's second claim however, I find that he was not advised by court or counsel prior to his plea of the elements required to be established for any degree of homicide nor was he aware of the same; particularly, I find that petitioner was not advised by counsel or court, at any time, that an intent to cause the death or a design to effect the death of the victim was an essential element of Murder 2nd degree. As stated by the Supreme Court, "a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." McCarthy v. United States, 394 U.S. 459, 466(1969). Based upon the foregoing,

Memorandum Decision and Order, October 29, 1974.

I hold as a matter of law that petitioner's plea of guilty was not intelligently or knowingly entered and was, therefore, involuntary. Accordingly, petitioner's plea of guilty to Murder 2nd degree must be set aside as involuntary and unconstitutional.

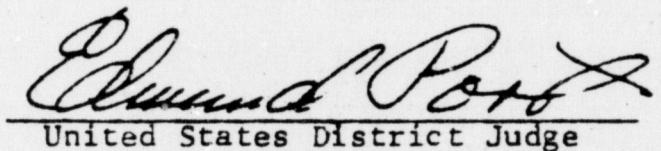
The foregoing opinion constitutes the court's finding of fact and conclusions of law in accordance with F.R. Civ. P., Rule 52(a).

For the reasons herein, it is

ORDERED, that the conviction challenged herein be and the same hereby is set aside, and it is further

ORDERED, that the respondent Superintendent discharge the petitioner Timothy G. Morgan from custody, unless the State of New York takes such steps as are necessary to return the petitioner to Fulton County for arraignment; said arraignment is to be held within 60 days of the date hereof, and it is further

ORDERED, that in the event a timely notice of appeal is filed, execution of the judgment herein be and the same hereby is stayed pending said appeal.

  
\_\_\_\_\_  
United States District Judge

Dated: October 29, 1974.  
Auburn, New York.

## Minutes of Federal Court Hearing, May 3, 1974.

1           **UNITED STATES DISTRICT COURT**  
2           **NORTHERN DISTRICT OF NEW YORK**

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3           **UNITED STATES OF AMERICA, ex rel** :  
4           **TIMOTHY G. MORGAN,**

5                         Petitioner, :

6                         -against- : 73-Cv-440

7           **ROBERT J. HENDERSON, Superintendent,** :  
8           **Auburn Correctional Facility,**

9                         Respondent. :

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11                  A hearing in the above-entitled matter was  
12                  held pursuant to notice at the United States District  
13                  Court in and for the Northern District of New York,  
14                  at Auburn, New York, on May 3, 1974, before HON.  
15                  EDMUND PORT, United States District Judge.

17                  -----  
18  
19  
20  
21  
22  
23  
24  
25

## APPEARANCES

2 JOSEPH E. LYNCH, ESQ., Attorney and Counsellor  
3 at Law, Metcalf Plaza, Auburn, New York, Assigned  
4 Counsel appearing on behalf of the Petitioner;

- and -

HON. LOUIS J. LEFKOWITZ, Attorney General of  
the State of New York, Justice Building, Albany,  
New York, By: JOSEPH CASTELLANI, ESQ., Assistant  
Attorney General of Counsel, appearing in behalf of  
Respondent.

1 THE COURT: Alright, you may call the  
2 case.

3 THE CLERK: United States of America, ex  
4 rel Timothy G. Morgan against Robert J.  
5 Henderson, Superintendent, Auburn Correctional  
6 Facility, 73-Cv-440.

7 MR. LYNCH: Ready on behalf of the  
8 petitioner, Your Honor.

9 THE COURT: Both sides ready?

10 MR. CASTELLANI: Ready, Your Honor.

11 THE COURT: Alright. Now gentlemen, is  
12 there any--do either one of you want to make  
13 an opening statement?

14 MR. CASTELLANI: No, Your Honor.

15 THE COURT: Petitioner?

16 MR. LYNCH: No, Your Honor, I don't believe  
17 it is necessary.

18 THE COURT: Alright, I will take your  
19 proof.

20 MR. LYNCH: I wonder if on behalf of the  
21 petitioner I may have marked and offered in  
22 evidence the sentencing, which I believe is  
23 part of the court's file.

24 THE COURT: Yes.

25 MR. LYNCH: I think Your Honor has them.

1                   MR. CASTELLANI: Your Honor, I have copies  
2                   of it if you wish them. I have a copy of the  
3                   sentence and the plea--the transcript.

4                   THE COURT: I want to be sure what is  
5                   being offered here is what is on file, then  
6                   we can identify it and make it part of the  
7                   record.

8                   MR. LYNCH: Alright.

9                   THE COURT: I assume this is what you are  
10                  referring to (indicating)?

11                  MR. LYNCH: Yes, Your Honor.

12                  THE COURT: That is part of the record on  
13                  appeal in the Appellate Division?

14                  MR. LYNCH: Yes, sir.

15                  (Sentence and plea marked as Petitioner's  
16                  Exhibit Number 1 for identification).

17                  MR. LYNCH: I would like to offer it in  
18                  evidence if I may, Your Honor.

19                  THE COURT: Any objection?

20                  MR. CASTELLANI: No objection.

21                  THE COURT: Received.

22                  (Petitioner's Exhibit Number 1 for  
23                  identification received in evidence).

24                  MR. LYNCH: Timothy G. Morgan, please.

25                  T I M O T H Y   G.   M O R G A N,

1                   the petitioner, called as a witness in his own behalf,  
2                   being first duly sworn by the Clerk of the Court, was  
3                   examined and testified as follows:

**DIRECT EXAMINATION**

5 | BY MR. LYNCH:

5 Q Now will you speak up Mr. Morgan so we can all hear  
6  
7 you here?

8 A Yes, sir.

9 Q Will you tell me if you don't understand any of the  
10 questions asked you?

11 A Yes, Sir.

12 Q How old are you, Mr. Morgan?

13 Twenty-eight.

14. How much schooling have you had?

As far as the seventh grade.

16 Q Did you get to the seventh grade by passing each of the  
17 preliminary grades?

18 | Page No. 547

19 Q Let me ask you quickly, do you recognize that you have  
20 less than normal intelligent capacity?

21 | P a g e

22 — *What have been told that?*

23

24

25

1 Q Were you passed on from grade to grade simply because  
2 of your size and not because you had successfully com-  
3 pleted the grade that you were passing?

4 A Yes.

5 Q Be sure if you don't understand my questions that you  
6 tell me.

7 A I don't understand.

8 Q Were you passed from grade to grade because of your  
9 size?

10 A Yes.

11 Q Now Mr. Morgan, did there come a time in 1965 when you  
12 were accused of murdering Mrs. Ada Francisco?

13 A Yes.

14 Q Do you know the crime that you were charged with  
15 originally?

16 A First degree murder.

17 Q Did the court appoint some attorneys to help you in  
18 your defense?

19 A Yes, sir.

20 Q Who were they?

21 A Mr. Rinehart and Mr. Best.

22 Q Are those the two gentlemen that are seated behind the  
23 rail in the courtroom?

24 A Yes, sir.

25 Q Did there come a time, Mr. Morgan, when you pled to the

1 charge of murder in the second degree?

2 A Yes.

3 THE COURT: Pled guilty, I assume you mean?

4 MR. LYNCH: Yes, if my question didn't  
5 indicate that it was meant to, Your Honor.

6 BY MR. LYNCH:

7 Q Now, Mr. Morgan, at that time did you understand what  
8 conduct a person had to engage in to be guilty of the  
9 crime of murder in the second degree?

10 A I don't understand what you are saying.

11 Q You don't understand the question?

12 A No.

13 Q Alright. Did you know then, when you pled to this  
14 crime, what the crime consisted of?

15 A No.

16 Q Did there come a time later when you learned some more  
17 about the crime of murder in the second degree?

18 A Yes.

19 Q And where was that that you gained this additional  
20 knowledge?

21 A After I got in Auburn, about five years later.

22 Q When you say Auburn, you mean the prison in Auburn?

23 A Yes.

24 Q Did you have some discussions with people in prison  
25 about that particular crime?

1 A My two friends.

2 Q Your two friends. Those are inmates of the Auburn  
3 Correctional Institution?

4 A Yes, sir.

5 Q What did you learn at that time about the crime that  
6 you pled to?

7 A They said you have to prove intent.

8 Q Intent to kill a human being?

9 A Yes.

10 Q Was that the first time Mr. Morgan that you knew that  
11 that was part of the proof of conduct of a person charged  
12 with murder in the second degree?

13 A Yes.

14 Q You have not known that before; is that right?

15 A No, sir.

16 Q Did you have any intent to kill this woman?

17 A No, sir.

18 Q If you had been told, Mr. Morgan, at the time of your  
19 plea that your plea was to a crime which required you  
20 to have an intent to kill this woman, would you have  
21 pleaded to murder in the second degree?

22 A No.

23 Q Is that because you did not have such an intent?

24 A That's right.

25 Q But you did plead to murder in the second degree; is that

1 right?

2 A Yes.

3 Q When you pleaded to that charge, did you know the  
4 maximum punishment that the court could impose on you?

5 A I don't understand what you are saying.

6 Q Alright.

7 MR. CASTELLANI: I can't hear him, Your  
8 Honor.

9 THE COURT: You will have to keep your  
10 voice up Mr. Morgan. You are mumbling and  
11 your chewing gum makes it hard for the attorney  
12 to hear you.

13 (Witness removes gum from his mouth).

14 THE COURT: That's right. That is a good  
15 idea. Put it in the wastebasket.

16 THE WITNESS: I am sorry.

17 THE COURT: Alright.

18 MR. LYNCH: May I have the last question?  
19 (The court reporter repeated the question  
20 as above recorded).

21 BY MR. LYNCH:

22 Q Mr. Morgan, at the time of your plea, did you know what  
23 you were going to be sentenced to?

24 A No, sir.

25 Q Did you know what you might be sentenced to?

1 A No, sir.

2 Q Did anyone ever tell you what the maximum punishment  
3 was that the court could impose on you as a result of  
4 pleading to this charge?

5 A I don't understand the question.

6 Q You knew, did you not Mr. Morgan, that if you pled to  
7 this charge some kind of punishment was going to be  
8 imposed on you; is that right?

9 A Yes, sir.

10 Q But you did not know what that punishment was going to  
11 be?

12 A No, sir.

13 Q Did you know what it might be? Did you know what the  
14 most serious punishment that could be imposed upon you  
15 was, if you made this plea?

16 A No, sir.

17 Q Now did you know, Mr. Morgan, that as a result of  
18 making this plea you could be sentenced to twenty years  
19 to life?

20 A No.

21 Q If you had known that before you pleaded, would you  
22 have pleaded to murder in the second degree?

23 A I don't understand the question.

24 Q You don't understand. Alright. You had some discussions  
25 did you not with your attorneys, the men that were hel...

1                   ing you, Mr. Best and Mr. Rinchart; did you not?

2   A   Yes.

3   Q   Did you, did they advise you to plead guilty to murder  
4                   in the second degree?

5   A   Yes, sir.

6   Q   And do you remember that? '

7   A   I don't.

8   Q   Did they tell you what sentence the court might impose  
9                   upon you if you pleaded?

10   A   For first degree or second degree?

11   Q   No, for second degree.

12   A   No.

13   Q   So that you did not know what you were exposing yourself  
14                   to by way of sentence when you made that plea; is that  
15                   right?

16   A   I still don't understand what you mean.

17   Q   I think you told us that you didn't know at the time  
18                   that you pled what sentence you were going to receive;  
19                   you didn't know that?

20   A   No, sir.

21   Q   My question to you is if you knew--strike that if you  
22                   will please. Did you know what sentence the court  
23                   might impose on you? In other words---

24                   THE COURT: Did you know that you could go  
25                   to prison?

1                   THE WITNESS: For which one?

2                   THE COURT: For either one.

3                   THE WITNESS: Yes.

4                   THE COURT: Did you know that you could go  
5                   to prison for second degree?

6                   THE WITNESS: Yes. But I didn't think I  
7                   would get so much time.

8                   THE COURT: Did you know that you could  
9                   go to prison for as long as life?

10                  THE WITNESS: No.

11                  BY MR. LYNCH:

12                  Q     Did you know that you could go for as long as twenty-  
13                   five years?

14                  A     For first degree, yes.

15                  THE COURT: No, for second degree.

16                  THE WITNESS: I didn't know for second  
17                   degree.

18                  THE COURT: What did you think was the  
19                   sentence that you could get for second degree  
20                   murder?

21                  THE WITNESS: I figured it would be a lot  
22                   less than what it was. I didn't think it  
23                   was going to be life, otherwise I would never  
24                   have done it.

25                  BY MR. LYNCH:

1 Q Mr. Morgan, if you had known that you were exposing  
2 yourself to a sentence that could be as little as  
3 twenty years and as long as life, would you have pled  
4 guilty to murder in the second degree?

5 A No sir, I wouldn't.

6 THE COURT: Now did you understand that  
7 question?

8 THE WITNESS: Yes, sir.

9 BY MR. LYNCH:

10 Q You are not still answering my questions. Is there any  
11 question I asked you about understanding this, that you  
12 don't understand?

13 A I am confused.

14 Q Let me see if I could summarize. Did you ever intend  
15 to kill this woman?

16 A No, sir.

17 Q If you knew that the State had to prove that you had an  
18 intent to kill her, to convict you of murder in the  
19 second degree, would you have pled to murder second?  
20 In other words, if you knew that they had to prove that  
21 you intended to kill her, would you have pled to murder  
22 in the second degree?

23 A No.

24 Q If you knew that you were exposing yourself to a  
25 punishment that could run as high as life imprisonment,

Timothy G. Morgan - Direct  
42

1 would you have pled to murder in the second degree?

2 A No.

3 MR. LYNCH: Thank you, Mr. Morgan. You  
4 may ask.

5 CROSS-EXAMINATION

6 BY MR. CASTELLANI:

7 Q Mr. Morgan, this petition that you submitted to the  
8 Federal Court, did you prepare it?

9 A No, sir.

10 Q Who did?

11 A Two friends of mine.

12 Q Did you read it?

13 A No.

14 Q Did you sign it?

15 A Yes.

16 Q Did you swear to it before a Notary Public?

17 A Yes, sir.

18 Q And still you didn't know what you actually signed?

19 A I knew what was in it.

20 Q How did you know?

21 A Because my friends went over it with me.

22 Q But did you read it?

23 A What I could, yes.

24 Q You were just asked and told me that you didn't read it  
25 before you signed it. Which is it?

1 A I read what I could of it.

2 Q What did you read of it?

3 A I looked at it.

4 Q How about this notice of appeal, did you draw that up  
5 this typewritten notice of appeal?

6 A Yes, sir.

7 Q Did you sign it?

8 A Yes, sir.

9 Q Did you read it before you signed it?

10 A No, sir.

11 Q Still you swore to it before a Notary Public?

12 A Yes, sir.

13 Q Mr. Morgan, at the time of the commission of this crime  
14 were you satisfied that you were well represented by  
15 Mr. Rinehart and Mr. Best?

16 A No.

17 Q Did you object?

18 A No.

19 Q Why didn't you, if you were not satisfied?

20 A Because I didn't think I was going to get what I got.

21 Q What did you think you were going to get?

22 A I didn't think I would get life. I thought I would get  
23 a lesser plea.

24 THE COURT: Lesser plea or lesser sentence?

25 THE WITNESS: A lesser sentence.

1                   THE COURT: What sentence did you think you  
2                   were going to get, about how many years?

3                   THE WITNESS: I don't know.

4                   THE COURT: You just expected it to be  
5                   less than what you got?

6                   THE WITNESS: I figured second degree you  
7                   are not going to get as much as you are for  
8                   first.

9                   THE COURT: Is that what you had in mind  
10                  that you wouldn't get as much as you would get  
11                  for first?

12                  THE WITNESS: If I went to trial and was  
13                  found guilty in the first degree, I knew I  
14                  was going to get life. In second degree, I  
15                  didn't know.

16                  BY MR. CASTELLA:

17                  Q        Mr. Morgan, you were indicted for murder first?

18                  A        Yes, I was.

19                  Q        Did you know what the punishment was, punishment for  
20                  murder first?

21                  A        Yes, sir.

22                  Q        What was it?

23                  A        Life in prison.

24                  Q        What else?

25                  A        That is it.

1 Q Would you have been willing to stand trial---  
2 A (Interrupting) Yes, sir.  
3 Q (Continuing)--on your crime that you were accused of?  
4 A Yes sir, I would.  
5 Q Why didn't you?  
6 A Because he told me I was going to get a lesser plea.  
7 Q Who told you that?  
8 A Mr. Rinehart.  
9 Q Mr. Rinehart told you what? Say that again?  
10 A I was going to get a lesser plea.  
11 Q A lesser plea?

12 THE COURT: Just think of what you are  
13 saying. Sentence, is that what you mean?

14 THE WITNESS: Yes.

15 BY MR. CASTELLANI:

16 Q Did he tell you what you would receive if you were  
17 found guilty or if you pled guilty to murder first?

18 A Yes.

19 Q What did he say?

20 A He said if I went to trial in the first degree that I  
21 could get life.

22 Q And what did he say to you if you were to plead guilty  
23 to murder first?

24 A He said I would get a lesser sentence.

25 Q First degree?

1 A To murder first. That is what he said, murder first.

2 Q Then he never advised you what would happen if you were  
3 to stand trial for murder first and found guilty?

4 A Me?

5 Q Whether you understood that?

6 A I don't know. I am confused. I don't know what you are  
7 saying.

8 THE COURT: Well did you have any dis-  
9 cussions with your lawyers, did you talk with  
10 your lawyers about pleading guilty to first  
11 degree murder or was that talk just related to  
12 the trial of first degree murder?

13 THE WITNESS: That was for first degree.

14 THE COURT: Yes, but did you talk about  
15 pleading to it or standing trial or both?

16 THE WITNESS: They told me to take second  
17 degree, to plead to the second degree.

18 THE COURT: Did they tell you what would  
19 happen if you were convicted of first degree?

20 THE WITNESS: Yes. They said if I went  
21 to trial and blew the trial that I could end  
22 up in prison for the rest of my life.

23 THE COURT: You could get a life sentence?

24 THE WITNESS: Yes.

25 THE COURT: Now did they tell you what you

1           would get on second degree?

2           THE WITNESS: No.

3           THE COURT: Did they tell you whether it  
4           was lesser, the same, or what?

5           THE WITNESS: They said if you take second  
6           degree you get a lesser plea.

7           THE COURT: Get a lesser sentence?

8           THE WITNESS: Lesser sentence, right.

9 BY MR. CASTELLANI:

10 Q       But they didn't tell you Mr. Morgan, what the lesser  
11          sentence would be----

12 A       (Interrupting) No.

13 Q       (Continuing) ---if you pled guilty to murder two?

14 A       No.

15 Q       Did you ask them?

16 A       No.

17 Q       Why not?

18 A       I don't know.

19 Q       You don't know why. Don't you think you should have  
20          asked them?

21 A       I did what they told to do.

22 Q       So that you were satisfied with their representation?

23 A       I figured they knew what they were doing, yes.

24 Q       Who are those two friends of yours that drew up the  
25          petition and notice of appeal?

1 A His name is Paul Ganvi and Gene Boch. The other guy is  
2 gone. He went to another institution.

3 THE COURT: The other guy was your Court  
4 of Appeals lawyer?

5 THE WITNESS: Yes.

6 THE COURT: He drew the notice of appeal.

7 BY MR. CASTELLANI:

8 Q You say, you answered on direct examination, that you  
9 went to the seventh grade?

10 A Yes, sir.

11 Q And what happened?

12 A They just passed me on.

13 Q What happened after seventh grade, did you quit school?

14 A No, I got kicked out.

15 Q Then what did you do?

16 A I was sent to Rome.

17 Q Have you had any schooling since you have been confined  
18 to prison?

19 A Six months.

20 Q What would you say your average intelligence is now?

21 A I don't know. It was a low average.

22 MR. CASTELLANI: That is all, Your Honor.

23 RE-DIRECT EXAMINATION

24 BY MR. LYNCH:

25 Q Mr. Morgan, so there will be no question about it,

1 to the extent that you were able, did you look at the  
2 petition that you signed?

3 A Yes.

4 Q And you went over it with your friends?

5 A Yes.

6 Q And you understood that that petition was asking this  
7 Court for relief for you?

8 A Yes.

9 Q That they correct what you consider to be errors on the  
10 part of an earlier court?

11 A Yes.

12 Q Your attorneys told you that if you stood trial on the  
13 first degree murder charge you could get life imprison-  
14 ment?

15 A Yes.

16 Q And you didn't want to take that chance, did you?

17 A No.

18 Q You actually got a sentence when you pled to murder  
19 second of twenty-five years to life; is that correct?

20 A Yes, sir.

21 Q And if you knew that that sentence could have been  
22 imposed on you, as it was, you told me, did you not,  
23 that you wouldn't have pled to it?

24 A That's right.

25 Q Because basically in your eyes that is the same sentence

1 that you would have received if you were convicted for  
2 murder first; is that right?

3 A Yes.

4 MR. LYNCH: Thank you, Mr. Morgan. That  
5 is all. Your Honor.

6 MR. CASTELLANI: No further questions,  
7 Your Honor.

8 (Witness excused).

9 MR. LYNCH: Petitioner rests at this time,  
10 Your Honor.

THE COURT: Alright. That is all. You  
may go ahead Mr. Castellani.

13 MR. CASTELLANI: Call Mr. Schlusberg.

H. ANDREW SCHLUSBERG,  
called as a witness in behalf of the respondent, being  
first duly sworn by the Clerk of the Court, was  
examined and testified as follows:

## **DIRECT EXAMINATION**

19 BY MR. CASTELLANI:

20 Q Mr. Schlusberg, you are duly qualified as an attorney  
21 to practice law in the State of New York.

22

23 Q Were you an attorney during the year 1965?

## 24 A Yes, I what?

25 An attorney

1 A Yes.

2 Q Were you acting in an official capacity during the year  
3 1965?

4 A I was.

5 Q And what was that official capacity?

6 A District Attorney of Fulton County.

7 Q District Attorney of Fulton County. Mr. Schlusberg,  
8 during the course of your duties as District Attorney  
9 of Fulton County, were you involved in the case of the  
10 People of the State of New York vs. Timothy G. Morgan?

11 A Yes, I was.

12 Q Do you recall the nature of that crime?

13 A I do recall that.

14 Q And what was the crime that was committed by him?

15 MR. LYNCH: I object to the form of the  
16 question. I have no objection to the charge,  
17 to the nature of the crime, although I don't  
18 know that the nature of the crime has any signifi-  
19 cance in this hearing. If the question is  
20 given to elicit a factual description of what  
21 took place, I won't object to it.

22 THE COURT: Overruled. I think that is a  
23 question that goes to the very issue that we  
24 are concerned with here as to whether or not  
25 it was a reason choice. Of course if it

1                   appeared under the facts that this was clearly  
2                   an incident or understanding, that would be  
3                   one situation that would enter into the reason  
4                   or lack of a reason choice. On the other hand,  
5                   if it appears it was a border kind of act, it  
6                   would also enter into in a contrary fashion a  
7                   reasonable choice.

8                   MR. LYNCH: Could I ask permission to sit  
9                   here because I have some difficulty hearing.

10                  THE COURT: Of course, and I will ask Mr.  
11                  Schlusberg if he would keep his voice up.

12                  THE WITNESS: Alright.

13                  BY MR. CASTELLANI:

14                  Q       Mr. Schlusberg, as a representative of the People in  
15                  that case, were you present at the time he was arraigned  
16                  of the crime of murder first?

17                  A       I was.

18                  Q       At that time was he represented by counsel?

19                  A       He was.

20                  Q       And who represented him?

21                  A       Two attorneys. Mr. Floyd J. Rinehart and Mr. Robert  
22                  Best.

23                  Q       Were you acquainted with both of those attorneys at the  
24                  time?

25                  A       Very well.

1 Q Were you also present at all stages of the preliminary  
2 proceedings in this case including the time of his  
3 plea?

4 A It was my recollection that I was present.

5 Q And who else from your office was with you at the time?

6 A It is my recollection--I think I looked at the file  
7 of course, and the Assistant District Attorney was Mr.  
8 James Persico.

9 Q Is he here present in the courtroom?

10 A Yes, he is.

11 Q And were you and Mr. Persico also present---I am not  
12 sure whether you answered my question, at the time of  
13 the plea?

14 A Yes I was and he was too.

15 Q To go back a little, Mr. Schlusberg, he was indicted of  
16 murder first?

17 A That's right.

18 Q Did he plead to that charge?

19 A No. Well, his regular plea was not guilty.

20 THE COURT: Isn't that the mandatory plea,  
21 or wasn't that the mandatory plea at that time?

22 THE WITNESS: You are right, Your Honor.

23 BY MR. CASTELLANI:

24 Q And at the time of his plea to murder two, did you have  
25 occasion to discuss that particular plea with the Judge,

1           your Assistant, Mr. Persico, and the two assigned -  
2           counsel?

3   A    That is my recollection, that there was opportunity,  
4           there was discussion between Mr.--assigned       1,  
5           Mr. Persico and myself.

6   Q    Was it agreeable with all parties including Judge Soden  
7           at that change of the plea to murder second would be  
8           acceptable?

9   A    That is correct.

10   Q    And then there came a time when the defendant was  
11           brought into court and he was prepared to plead to  
12           murder two?

13   A    That is my recollection.

14   Q    And he did this in the presence of his assigned counsel,  
15           did he not?

16   A    Yes, it was.

17   Q    And also your Assistant, Mr. Persico?

18   A    Yes.

19   Q    And of course the Judge?

20   A    Yes. And members of his family as well were there.

21   Q    What members of his family were there, do you recall?

22   A    Brothers and sisters.

23   Q    Was his mother there?

24   A    I have no such recollection.

25   Q    Was his father there?

1 A I don't recall.

2 Q Were you also present at the time he was sentenced---

3 A (Interrupting) Yes I was.

4 Q (Continuing) ---to murder two?

5 A Yes I was.

6 Q And was your Assistant, Mr. Persico, also present there?

7 A Yes he was.

8 Q And was Mr. Rinehart and Mr. Best also present?

9 A They certainly were.

10 Q And of course so was the defendant?

11 A Yes.

12 THE COURT: Just to refresh your  
13 recollection, it is my recollection from having  
14 read the sentencing minutes that Mr. Best had  
15 been excused from attendance by the court.  
16 Does that refresh your recollection any?

17 THE WITNESS: Now that you mention it, Your  
18 Honor, I have not seen the file. The file was  
19 turned over, of course, to my successor but I  
20 recall, now that you remind me Your Honor, that  
21 Mr. Best had some other duty or some other  
22 business and that Mr. Rinehart was there.

23 BY MR. CASTELLANI:

24 Q So Mr. Best was not there and present at the time of the  
25 sentence?

1                   THE COURT: If you don't recall, it is easy  
2                   enough to tell us.

3   A   I don't recall without looking at the record.

4   Q   In any event, if not both of his attorneys, one of them  
5                   was there?

6   A   That is for sure.

7   Q   And you don't recall which one?

8   A   My recollection which is now refreshed by His Honor, it  
9                   was Mr. Rinehart who was there and Mr. Best had some  
10                  other business or function and could not stay.

11   Q   Mr. Schlusberg, to the best of your recollection, did  
12                  the court explain to the defendant the nature of his  
13                  plea, the possibility of the punishment involved and did  
14                  he further convey to you the impression that Mr.---did  
15                  the Judge convey to you the impression that he was aware  
16                  that the defendant understood the nature of the proceed-  
17                  ing that was taking place at the time?

18                   MR. LYNCH: I will object to that question.

19                   THE COURT: Sustained. I am sure Judge  
20                  Soden wouldn't have taken the plea otherwise.

21                   BY MR. CASTELLANI:

22   Q   Mr. Schlusberg, in your mind, do you recall to the best  
23                  of your recollection, did this defendant understand what  
24                  he was pleading to?

25   A   Well, the---

1 THE COURT: Sustained.

2 MR. LYNCH: I object to that, Your Honor.

3 I don't believe----

4 THE COURT: Sustained.

5 MR. CASTELLANI: I have no further questions,  
6 Your Honor.

7 MR. LYNCH: I may have no questions for  
8 the witness, but I wonder if the former District  
9 Attorney's file was here and if I may have a  
10 quick opportunity to look at it.

11 THE COURT: I don't know. Is the file here?

12 MR. CASTELLANI: I have a file that is  
13 very voluminous.

14 THE COURT: I will tell you what I will do.  
15 Make the file available to counsel. I have  
16 some other business to take care of but while  
17 I am giving you the opportunity---I appreciate  
18 you have not had an opportunity to talk with  
19 your witnesses. I know I convened court as soon  
20 as they walked into the courtroom. I can  
21 recess this case until 2:00 o'clock.

22 MR. CASTELLANI: Your Honor, are we  
23 finished with this witness?

24 MR. LYNCH: Let me say, on the basis of  
25 the direct examination, I have no questions of

1                   the witness. There might be something in the  
2                   file---

3                   THE COURT: Let me ask you this, Mr.  
4                   Schlusberg. Do you have any objection to  
5                   continuing your visit here in Auburn until  
6                   this afternoon?

7                   THE WITNESS: I have none, Your Honor.

8                   THE COURT: Alright, you are a welcome  
9                   guest.

10                  MR. CASTELLANI: Your Honor, I of course  
11                  have no objection to staying here all day, but  
12                  I do hope you have in mind the fact that my  
13                  witnesses came a long way and are hoping that  
14                  they can get back home in this inclement  
15                  weather.

16                  THE COURT: I certainly won't detain them  
17                  beyond the necessity of the case.

18                  MR. CASTELLANI: Is it at all possible that  
19                  we can continue before 2:00 o'clock?

20                  THE COURT: I doubt it. Yes, if you want  
21                  to recess until 1:30, if that is satisfactory,  
22                  and if that is satisfactory you can let the  
23                  Clerk of the Court know and the Court will be  
24                  available.

25                  MR. LYNCH: I have no objection on behalf

1                   of the petitioner.

2                   THE COURT: Alright. This Court will  
3                   recess until 1:30. The Marshal will provide  
4                   for the petitioner.

5                   (Whereupon at this point a recess was  
6                   taken in this matter until 1:30 P.M. o'clock  
7                   of the same day).

8                   - - -

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H. Andrew Schlusberg - Direct

A F T E R N O O N   S E S S I O N

APPZARANCES: (SAME AS MORNING SESSION).

THE COURT: Alright, Mr. Lynch, you may proceed.

MR. LYNCH: If the Court please, I have no questions of Mr. Schlusberg.

THE COURT: You have any need for Mr. Schlusberg?

MR. CASTELLANI: No, Your Honor.

THE COURT: You are excused, Mr. Schlusberg.  
(Witness excused).

MR. CASTELLANI: I would like to call Mr. Rinehart.

F L O Y D J. R I N E H A R T,

called as a witness in behalf of the Respondent, being first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CASTELLANI:

Q Mr. Rinehart, you are duly licensed to practice law in the State of New York?

A I am.

Q Where is your office located?

A Amsterdam, New York.

Q What county is that?

1 A Montgomery.

2 Q Montgomery County, adjoining Fulton County?

3 A Yes, it is.

4 Q And you were practicing there during the year 1965?

5 A Yes, sir.

6 Q Mr. Rinehart in the year 1965, were you involved in the  
7 case of the People of the State of New York vs. Timothy  
8 Morgan?

9 A I was.

10 Q And in what capacity?

11 A Assigned counsel.

12 Q Assigned counsel?

13 A With Mr. Robert Best.

14 Q Was that before or after the arraignment of Mr. Morgan?

15 A I think it was at the arraignment.

16 Q You think it was at the arraignment that both you and  
17 Mr. Best were assigned together?

18 A We were assigned together, yes.

19 Q And you were both present there at the arraignment?

20 A My recollection is that we were.

21 Q After you were assigned to the defendant, Mr. Morgan,  
22 did you have subsequent conversations with him regarding  
23 the charges in the indictment?

24 A Well you see this is supposed to have occurred on the  
25 7th of April, 1965. The grand jury, as I recall, was in

1 session, and the indictment was returned on the 15th  
2 of April, 1965, and we discussed that with our client,  
3 discussed it, we made various motions, tried to obtain  
4 the alleged confessions there, tried to change the venue,  
5 discussed it with the District Attorney, went over the  
6 facts to find out what the circumstances were, trying  
7 to get ready for trial.

8 Q Did you also discuss the matter with any members of his  
9 family?

10 A Yes. He had two brothers and his mother who were there  
11 and there were some other members of his family--I don't  
12 know whether they were the wives of the brothers or who  
13 they were.

14 Q And now Mr. Morgan was indicted for the crime of murder  
15 first; is that correct?

16 A Yes.

17 Q Did you inform Mr. Morgan at the time of the possible  
18 punishment that would be involved if he was tried and  
19 found guilty on murder first?

20 A Yes. While I don't recall my exact words at this time,  
21 murder first was punishable by death in the electric  
22 chair.

23 THE COURT: Are you referring to the time  
24 of the indictment?

25 THE WITNESS: Yes. April 15, 1965.

1 BY MR. CASTELLANI:

2 Q Did you inform the defendant of that possibility?

3 A Well I can't remember my exact words of course. I told  
4 him that he could go to the chair for his crime if he  
5 got convicted of murder first.

6 Q Did the defendant in your judgment realize the distinction  
7 of the punishment that would be involved in the event  
8 he was found guilty of murder first?

9 MR. LYNCH: I will object to the question  
10 on the ground it calls for a conclusion. If  
11 he wants to elicit facts---

12 THE COURT: I will take the substance of  
13 the conversation.

14 THE WITNESS: Your Honor, this involved a  
15 lot of publicity. The papers were filled with  
16 it. The radio and television also. So that  
17 possibility was discussed with him, but I can't  
18 remember the exact words.

19 THE COURT: Well you say you are sure of  
20 the possibility, that is the possibility of a  
21 death sentence.

22 THE WITNESS: Yes.

23 THE COURT: In the event of a conviction.

24 THE WITNESS: That's right, sir. I am sure  
25 I told him if he got convicted of murder first.

1                   he would go to the electric chair, if it were  
2                   not---

3   Q    In other words, you as defense counsel realized in your  
4                   mind that this was a premeditated murder?

5                   MR. LYNCH: Object to the form of the  
6                   question as leading.

7   A    No, how would I know that. I didn't say that. My  
8                   argument to the District Attorney was that it wasn't.  
9                   That it happened on the spur of the moment.

10                  THE COURT: You were the advocate. You  
11                   were assigned to defend this man.

12                  THE WITNESS: Yes, and I wouldn't start  
13                   off with that.

14                  BY MR. CASTELLANI:

15   Q    After giving the matter some thought in your own mind,  
16                   did you feel that he could possibly be found guilty of  
17                   murder in the first degree?

18   A    Well, I have been through this stuff before. There is  
19                   always a possibility if you are indicted for murder  
20                   first, and the jury may convict you of murder first.  
21                   This involves the death of a woman and there was some  
22                   feeling in the community there and I didn't know what  
23                   could happen.

24   Q    Did you and Mr. Best confer and give some thought to a  
25                   lesser degree than murder first?

1 A Yes. I thought manslaughter first would satisfy the  
2 needs of justice in this case. We argued that with  
3 the District Attorney time and time again, but he  
4 wouldn't budge.

5 Q Did you discuss this with Mr. Morgan?

6 A I don't know that we discussed it with him, except he  
7 knew we were doing the best for him.

8 Q Was there discussion with his family on that?

9 A I think so, on the date the plea was entered up in  
10 Court in Johnstown.

11 Q Did they know he was going to plead?

12 A Yes, we discussed it and arranged for the plea on that  
13 day.

14 Q Did you feel that a plea to murder second was in his  
15 best interest?

16 A There was not much choice of best interest. Murder  
17 second is pretty severe. Murder first at that time  
18 carried the electric chair or life imprisonment, and I  
19 thought that manslaughter first would be sufficient but  
20 we couldn't get it without a trial.

21 Q Did you have some discussion with the District Attorney  
22 and his Assistant, and with your co-assigned counsel,  
23 that it would be best to plead to murder second?

24 A Well, we argued this. You know these arguments were better  
25 between the District Attorney and his office and Mr.

1 Best and myself. We thought that we were looking it  
2 all over and that murder second would be twenty-five  
3 years. I thought that manslaughter first would be  
4 sufficient, but we couldn't get it, and we were con-  
5 fronted with the possibility that he might go to the  
6 electric chair. It just so happened that they abolished  
7 the electric chair in about, I think, June or July of  
8 1965 when there was a Bill before the Legislature.

9 THE COURT: But at the time the plea was  
10 entered, the conviction could have carried  
11 either the death penalty or life imprisonment.

12 THE WITNESS: I don't think it could have.  
13 The death penalty, I think the Governor signed  
14 that Bill sometime before---was it June 15th  
15 or July 15th, and it was on April 15th that  
16 he was indicted. Was it June 15th of the  
17 sentencing?

18 BY MR. CASTELLANI:

19 Q June.

20 A June 15th. I think the Governor signed that Bill just  
21 shortly before that so that the death penalty had been  
22 eliminated.

23 THE COURT: So the penalty then would have  
24 been what?

25 THE WITNESS: Life imprisonment.

1                   THE COURT: Mandatory life imprisonment?

2                   THE WITNESS: Yes.

3                   THE COURT: So what you were faced with  
4                   was an alternative of conviction for the first  
5                   degree murder carrying a mandatory prison  
6                   sentence or a plea of guilty to second degree  
7                   murder carrying a minimum of what, if you  
8                   recall?

9                   THE WITNESS: I thought twenty years to  
10                  life. Then at the last minute the Judge said  
11                  it has got to be twenty-five.

12                  THE COURT: In any event you knew it was  
13                  some length, with a minimum of twenty?

14                  THE WITNESS: Yes, sir.

15                  THE COURT: And a maximum of life.

16                  THE WITNESS: Yes, it was a minimum of  
17                  twenty years to life, but it wound up with  
18                  twenty-five to life.

19                  THE COURT: You didn't have any assurances  
20                  of what the actual sentence was going to be?

21                  THE WITNESS: Yes, I knew exactly what  
22                  the sentence was going to be before I entered  
23                  the plea of guilty.

24                  THE COURT: From whom?

25                  THE WITNESS: From the District Attorney.

1                   THE COURT: Did you discuss it with the  
2                   Court?

3                   THE WITNESS: I am pretty sure I did. I  
4                   always have had to, well, talk to me about it.  
5                   I can't recall exactly now, Judge.

6                   THE COURT: Would your file indicate?

7                   THE WITNESS: No, I didn't keep a record  
8                   of that but Mr. Best knows--I don't know if  
9                   Judge Soden said to us--we talked to the  
10                  District Attorney in his office and he talked  
11                  to the Judge, and we finally got the report  
12                  that the least that they would consider would  
13                  be murder second, at which the sentence would  
14                  be twenty-five years to life.

15                  THE COURT: That is you were told that that  
16                  would be the sentence.

17                  THE WITNESS: Yes.

18                  THE COURT: I see. So the sentence was the  
19                  sentence that you were told he would have.

20                  THE WITNESS: Yes, there was no surprise  
21                  on the sentence. I knew what it was going to be.

22                  THE COURT: Did you advise the defendant  
23                  of that?

24                  THE WITNESS: We did, yes, sir.

25                  THE COURT: Was the defendant's family

1 there at the time?

2 THE WITNESS: Yes, sir. Yes, sir. They  
3 were there.

4 THE COURT: Do you recall when that was,  
5 Mr. Rinehart?

6 THE WITNESS: I think it was on the 8th of  
7 June, 1965.

8 THE COURT: Can you fix that with reference  
9 to the date of the actual sentence?

10 THE WITNESS: The actual sentence was on  
11 the 15th of June. I think. And this was on  
12 the 8th of June, 1965.

13 THE COURT: Was this after the plea was  
14 entered?

15 THE WITNESS: We entered the plea one day  
16 and they adjourned it for a week, and the time  
17 of sentence was on the 15th.

18 THE COURT: At the time of the plea were  
19 you aware of the sentence?

20 THE WITNESS: Oh, yes.

21 THE COURT: And you conveyed that to the  
22 defendant prior to the entry of the plea?

23 THE WITNESS: Oh, yes. I couldn't do it  
24 otherwise.

25 THE COURT: At that time you were practicing

1 law for how long?

2 THE WITNESS: 1927. Nearly forty years.

3 THE COURT: And you have been actively  
4 engaged in the practice of criminal law?

5 THE WITNESS: Yes, I have had quite a bit  
6 of criminal law.

7 THE COURT: I think in one of these things  
8 you were referred to as one of the leading  
9 criminal lawyers in the area.

10 THE WITNESS: They all wind up getting  
11 treated as criminal lawyers. I did a lot of  
12 criminal work. I do a lot of cases, but I  
13 never can remember disposing of a case unless  
14 I was reasonably assured what the sentence was  
15 going to be.

16 THE COURT: Of course you never practiced  
17 in this Court.

18 THE WITNESS: If they wouldn't tell me  
19 then I would say, "Let's take our chances on  
20 the jury."

21 THE COURT: But that was the practice and  
22 that is what you are satisfied occurred here?

23 THE WITNESS: Yes, because some Supreme  
24 Court Judges say they don't want anybody to  
25 plead guilty unless they know what the sentence

1                   is going to be. Others are very indefinite  
2                   on that, so you have to deal with the District  
3                   Attorney.

4                   THE COURT: In this particular instance  
5                   you are satisfied you knew and the defendant  
6                   knew exactly what the sentence was going to  
7                   be?

8                   THE WITNESS: Yes, because I felt that the  
9                   extra five years was putting it on too hard,  
10                  Because I was familiar with other cases where  
11                  the Judge made the sentence fifteen years to  
12                  life and years later the Judge tried to get it  
13                  reduced and the Governor wouldn't reduce it.  
14                  That happened on different occasions. But yes,  
15                  I knew what the sentence was going to be and  
16                  I told my client.

17                  BY MR. CASTELLANI:

18                  Q         Did your client make any objections or comments regard-  
19                  ing the possibility of a twenty-five to life sentence,  
20                  if you recall?

21                  A         At that time he wanted to get rid of the case possibly  
22                  because of the pressure and his mental capacity to  
23                  handle the situation with a low IQ and so forth. At  
24                  that time, my recollection is, we were there in a room,  
25                  and the question was whether we would enter a plea or

1 get ready to proceed to trial, and my recollection is  
2 he wanted to get rid of it and I didn't go into details  
3 about the consequences or anything.

4 MR. CASTELLANI: I have no further  
5 questions.

6 THE COURT: You say you didn't go into the  
7 details of the consequences, but did you under-  
8 stand the difference between first and second  
9 degree murder?

10 THE WITNESS: No. Just that one involved  
11 life imprisonment and the other was a certain  
12 period of years.

13 THE COURT: You distinguished between first  
14 and second degree murder?

15 THE WITNESS: By the sentence.

16 THE COURT: By the punishment to be im-  
17 posed?

18 THE WITNESS: Yes, sir.

19 THE COURT: Rather than by the proof  
20 necessary.

21 THE WITNESS: Yes, sir. I didn't go into  
22 detail of what constituted murder first and  
23 what constituted murder second. As a rule, a  
24 defendant is only interested in the sentence,  
25 and the time.

1 MR. CASTELLANI: No further questions, Your  
2 Honor.

## **CROSS-EXAMINATION**

4 BY MR. LYNCH:

5 Q Mr. Rinehart, I am sure as an experienced trial counsel  
6 you will recognize that you were dealing with a young  
7 man who obviously didn't have the same IQ or  
8 intelligence as a normal young man of that kind would?

We had all the records from the Rome State School.

10 Q And he had been variously characterized as a moron?

11 A Sure.

12 Q I think you told us incidentally you can't remember  
13 the exact words with which you advised this young man,  
14 but it is your firm recollection that you told him what  
15 the punishment would be?

16 A I told him of course what the punishment would be, yes.

17      3      And that was the punishment that he received?

18 A I think I said, "We can get you off with murder second,"  
19 and I am not so sure that I said, "I recommend that you  
20 accept it" is what I probably did, but Mr. Best was  
21 present at any time I talked with Mr. Morgan.

At the time of sentencing, Mr. Kinehart, ---

23 A (Interrupting) That is the 15th of June, 1965.

24 Q (Continuing) ---on the 15th of June, 1965, do you recall  
25 pointing out in substance to the sentencing Judge that

1 your investigation revealed the possibility that this  
2 young man had meant no harm to this woman?

3 A They made a record of it.

4 Q Could we look at Exhibit 1?

5 A Didn't I make a statement to the Court before he sen-  
6 tenced him? Didn't I? I always do.

7 Q Would you like to refresh your recollection at page 32.  
8  
9 Mr. Rinehart and particularly the top most part of the  
page and after reading that yourself, see if it re-  
10 freshes your recollection?

11 A (Reading) "On the 6th of April, 1965, he went down  
12 to the room of his employer, Mrs. Annie Francisco, he  
13 took a knife with him, and I am sure at that time he  
14 meant no harm to his employer."

15 THE COURT: That is, of course, a plea  
16 for leniency.

17 THE WITNESS: Yes. I was still hoping to  
18 get it down to twenty years.

19 BY MR. LYNCH:

Q      Incidentally, I think you said at the last moment you  
21      were still hoping for a twenty year minimum sentence?

22 | A Year-

23 Q And at the last moment they refused to go along with  
24 that?

25 A Yes. When you negotiate with the District Attorney you

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1 have to get a reduction of the sentence from then on.

2 THE COURT: You mean a reduction of degree?

3 THE WITNESS: Yes. And then a reduction  
4 in the time involved.

5 BY MR. LYNCH:

6 Q And in conclusion, Mr. Rinehart, I think you told us  
7 you didn't point out the elements of the crime to this  
8 young man?

9 A No. No. We had the statements he was supposed to have  
10 made. We made application to the Court and got an  
11 order permitting them to be turned over.

12 THE COURT: Did you advise him as to your  
13 opinion as to the result of a conviction of  
14 second degree murder after a trial?

15 THE WITNESS: I don't think so.

16 MR. LYNCH: I have no further questions.

17 THE COURT: Did you advise him that an  
18 intent, for instance, could be found from his  
19 act?

20 THE WITNESS: No, I never entered into  
21 that because I know the circumstances surround-  
22 ing it.

23 RE-DIRECT EXAMINATION

24 BY MR. CASTELLANI:

25 Q Mr. Rinehart, one more question. When you went over

1           the facts and the circumstances of this crime with the  
2           defendant, did he explain to you what happened just  
3           before he committed the crime, that he went to the  
4           victim's room and argued with her and events that led  
5           up to the commission of the crime?

6       A    Well you know there was no conflicting conversation  
7           between the defendant and his lawyers as you can see  
8           and it just couldn't be different. You had to get in  
9           in dribs and drabs and my impression was that he went  
10          there to get his own money, he was getting a salary  
11          there and she was keeping for him, and he went there to  
12          get the money and she started screaming and so forth  
13          and then these events happened.

14      Q     Did he describe to you the actual commission of the  
15          crime? You knew that?

16      A     Of course I knew it. Everything carried this.

17           THE COURT: We are not relying on newspapers,  
18           but did the District Attorney have statements  
19           or confessions from the defendant?

20           THE WITNESS: Yes.

21           THE COURT: And did they outline the events  
22           occurring on that particular night?

23           THE WITNESS: It happened in Fulton County  
24           and he took an automobile and went from Fulton  
25           County up to Elizabethtown, one hundred miles

1 away, before he had an accident. ~~He was~~ ONLY COPY AVAILABLE  
2 hospitalized up there, and that is where the  
3 State Troopers got a statement as to the cir-  
4 cumstances because following the event, after  
5 the discovery you know, there were radio  
6 appeals made that went out to apprehend him.

7 THE COURT: I am sure with your experience  
8 you must have felt that there was a likelihood  
9 of his being convicted of second degree, or  
10 you wouldn't have pled him to it.

11 THE WITNESS: You know, the feeling was  
12 pretty high in the county and we couldn't get  
13 a change of venue and I was satisfied he  
14 wouldn't get much consideration from a jury.

15 THE COURT: And were you satisfied that  
16 the D.A. had sufficient evidence so that a  
17 jury verdict would stand up?

18 THE WITNESS: You know, I have had lots  
19 of cases at home, and I was satisfied that he  
20 would be prosecuted vigorously and that he  
21 would make out a case on him.

22 BY MR. CASTELLANI:

23 Q Mr. Rinehart, in reference to your testimony today,  
24 with regard to your representation of this defendant  
25 at the time of the commission of the crime and subsequent,

1 and prior to the plea, did your associate, Mr. Best,  
2 concur in all these decisions that were made between  
3 you and the D.A., you and the Court, and you and the  
4 defendant?

5 A Well he was doing just as I was doing in it. We  
6 worked together and we discussed what was the best thing  
7 to do in the matter and to see what we could do to  
8 build a defense, and he drew up most of the papers and  
9 prepared them and went into, very thoroughly, into the  
10 law, and I think he talked to Mr. Morgan more than I  
11 did.

12 Q Did he relay the substance of his conversations with  
13 Mr. Morgan to you which may or may not have directed  
14 you to arrive at the conclusion to recommend a plea of  
15 second murder?

16 MR. LYNCH: I think I would object to that  
17 question as being too vague.

18 THE COURT: I will let Mr. Rinehart answer  
19 it if he can.

20 THE WITNESS: He and I both thought we  
21 were doing the right thing except we thought  
22 the sentence was too severe.

23 THE COURT: This had excited your hopes,--  
24 I can say it excited cause you knew what to  
25 expect, but it excited your hopes by five years

1                   on the minimum. You were hopeful of having  
2                   the statutory minimum imposed instead of that  
3                   five years above the statue.

4                   THE WITNESS: Yes. And at that time there  
5                   were Bills in the Legislature to limit the  
6                   sentence for murder second, to do away with  
7                   the fifty years to life and forty years to  
8                   life and cut it down to twenty. I was satis-  
9                   fied no matter what the sentence was going to  
10                  be, he would eventually wind up with twenty  
11                  anyway. As far as hoping to walk out of the  
12                  courtroom with an acquittal with a case like  
13                  that, it just didn't seem possible to me.

14                  THE COURT: Is there anything further?

15                  MR. CASTELLANI: I have no further questions.

16                  RE-CROSS EXAMINATION

17                  BY MR. LYNCH:

18                  Q       Mr. Rinehart, is it a fair summary of what you told  
19                  this young man after talking with the District Attorney  
20                  and possibly with the Judge and knowing the differences  
21                  between sentences, did you tell him in substance that  
22                  he would be sentenced to twenty-five years in prison?

23                  A       I am positive of that.

24                  Q       You are positive of that?

25                  A       Yes.

1 MR. LYNCH: Alright. Thank you very much,

2 Mr. Rinehart.

3 (Witness excused).

4 MR. CASTELLANI: I have no further  
5 witnesses, Your Honor.

6 THE COURT: No further witnesses?

7 MR. CASTELLANI: I must explain to you  
8 that Mr. Best is in the courtroom and I feel  
9 in view of Mr. Rinehart's testimony, I wouldn't  
10 call him to testify unless you want him.

11 THE COURT: I am not going to conduct  
12 either the petitioner's case or the respondent's  
13 case, but if there is anything that Mr. Best  
14 can add, of course, I would be glad to have  
15 him. If there isn't, if it is just corroborative,  
16 I don't think I need it.

17 MR. CASTELLANI: May I put Mr. Best on the  
18 stand, Your Honor?

19 THE COURT: Alright.

20 ROBERT P. BEST

21 called as a witness in behalf of the Respondent, being  
22 first duly sworn by the Clerk of the Court, was  
23 examined and testified as follows:

24 DIRECT EXAMINATION

25 BY MR. CASTELLANI:

1 Q Mr. Best, you are an attorney duly licensed to practice  
2 law in the State of New York?

3 A Yes, sir.

4 Q And as an attorney you were practicing during the year  
5 1965?

6 A Yes, sir.

7 Q Where was your office located?

8 A In Gloversville.

9 Q In what county?

10 A Fulton.

11 Q And during the course of your practice, particularly  
12 during the year 1965, were you assigned as co-counsel  
13 to the defendant in the case of People vs. Morgan?

14 A Yes, Timothy Morgan, yes, sir.

15 Q And you heard the testimony of Mr. Rinehart. Do you  
16 concur in what he testified to?

17 A Yes, sir.

18 Q Now in addition, Mr. Best, did you discuss this matter  
19 with Mr. Morgan?

20 A Yes, I did.

21 Q Did you go into the facts with him carefully?

22 A Yes, sir.

23 Q What was the nature of that conversation that you went  
24 into the facts with Mr. Morgan as to the commission of  
25 this crime?

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Robert P. Best - Direct

1 A Well, as I recollect, and it has been awhile ago, that  
2 he had had a falling out with this lady two days before  
3 this event and he had---

4 THE COURT: Now you say this is a discussion  
5 now. Are you telling this to Morgan or Morgan  
6 telling it to you?

7 THE WITNESS: He is telling it to me. I  
8 delved into what happened.

9 THE COURT: This is in response to----

10 THE WITNESS: My questions.

11 THE COURT: Is this before or after you  
12 had access to the statements obtained by the  
13 District Attorney?

14 THE WITNESS: I think we had a conversation  
15 in the jail before we had the statement, yes,  
16 sir. We talked in the jail.

17 BY MR. CASTELLANI:

18 Q Will you go on and relate what the conversation was?

19 A Well he was concerned about--the lady was concerned  
20 about having him stay out later than he should. I  
21 think she hit him on this particular occasion at this  
22 argument, and as I understood it, she threatened him  
23 that if he didn't stop seeing this girl and come home  
24 on time, she would tell the people from the Rome State  
25 School, and that he would have to maybe go back to the

1 Rome State School, and this he didn't want to do. So  
2 on the particular occasion he went, on this night, he  
3 went to go down and get his money and take off. Because  
4 the next day they were supposed to come from the Rome  
5 State School and he didn't want her to tell them that  
6 he had been out doing something wrong.

7 Q What did he tell you happened that night?

8 A Well he went down and he had a knife with him and he  
9 went into her room to get his money and he woke her  
10 up. She started screaming and he stabbed her.

11 Q Did he tell you what he did following the stabbing?

12 A He took her car and took off. He took some money and  
13 then took her car.

14 Q Where did he go, do you know?

15 A Well he went generally north.

16 Q And where was he apprehended?

17 A He was apprehended on his way to Elizabethtown.

18 Q In miles, how far is that from Johnstown?

19 A It is quite a ways. I don't know exactly how many  
20 miles. Probably in the vicinity of 80 miles, 90 miles,  
21 or maybe more.

22 Q Did he tell you that he was apprehended and he made a  
23 statement to the State Police that he committed a  
24 crime?

25 A Yes.

1       Q     Referring back to Mr. Rinehart's testimony, did you  
2           concur or do you concur with him and did you concur  
3           at the time that it was to Mr. Morgan's best interest  
4           to plead to murder second?

5       A     Under the circumstances, yes, sir.

6       Q     And were you aware of the punishment that might be  
7           involved?

8       A     Yes.

9       Q     In a plea of murder second?

10      A     Yes.

11      Q     And was Mr. Morgan aware of it?

12      A     Yes, sir.

13      Q     And what was that punishment?

14      A     We were told it would be twenty-five years to life.

15           THE COURT: That was part of your plea  
16           bargaining.

17           THE WITNESS: Yes it was, sir.

18           MR. CASTELLANI: That is all.

19           THE WITNESS: We were trying to have it  
20           twenty years to life. We were arguing for  
21           that.

22           THE COURT: And of course Mr. Rinehart  
23           told us that you concurred and the defendant  
24           was given that information.

25           THE WITNESS: Yes, he was.

1 THE COURT: Before the plea was entered?

2 THE WITNESS: Yes, he was. Yes, sir.

3 MR. CASTELLANI: That ~~Q/A~~ <sup>COPY AVAILABLE</sup>.

4 CROSS-EXAMINATION

5 BY MR. LYNCH:

6 Q Did Mr. Morgan tell you, Mr. Best, that the money he  
7 was going to get was the money he had earned working  
8 on this farm?

9 A That is what he told me, sir. Yes, sir.

10 Q Actually, as you have indicated, it was his intention  
11 to take the money and leave so he could not be sent  
12 back to the School?

13 A That was his story, yes, sir.

14 Q Didn't he also tell you, consistent with that plan he  
15 had, gathered his possessions and put them on his  
16 person, and he went down to get the money?

17 A Well, I don't recall that detail.

18 Q But he might have?

19 A Yes, but I don't remember.

20 Q And this knife that he had was one of his possessions?

21 A Yes, sir.

22 Q Did he also tell you that it was in the argument that  
23 this woman started to scream and he struck her to quiet  
24 her?

25 A Yes, sir.

1 Q I think you said you did concur in Mr. Rinehart's  
2 testimony as to the information and how it was passed  
3 onto Mr. Morgan?

4 A Yes, sir.

5 ONLY COPY AVAILABLE  
5 MR. LYNCH: I think that is all.

6 THE COURT: Just one question I would like  
7 to know, did he describe or did you see the  
8 weapon, the knife?

9 THE WITNESS: It was a hunting knife. I  
10 don't think it was ever shown to me. It was  
11 found in the car, as I recollect it, which  
12 he was involved in the accident with, in the  
13 glove compartment, but I don't believe it was  
14 ever produced into evidence. We did get the  
15 statements that he made.

16 THE COURT: But you are satisfied it was  
17 a hunting knife, not a pocket knife?

18 THE WITNESS: I understand it was a hunting  
19 knife, as I recollect it.

20 THE COURT: And his first endeavor to stop  
21 the screams, I gather from what you told Mr.  
22 Lynch, was he struck her.

23 THE WITNESS: I think so.

24 THE COURT: I inferred that he struck her,  
25 not cut her, didn't use the knife?

1                   THE WITNESS: Not at first. She didn't  
2 stop screaming and then he used the knife many  
3 times. He didn't tell me that, but the  
4 allegation was that he hit her forty <sup>ONLY COPY AVAILABLE</sup> times  
5 with the knife.

6                   THE COURT: That was some of the factors  
7 that you considered in making your choice,  
8 in selecting your options?

9                   THE WITNESS: Yes, sir.

10                  THE COURT: Now, did you at any time tell  
11 him the difference between first degree murder  
12 and second degree murder, do you recall, other  
13 than the possible punishment?

14                  THE WITNESS: Well I honestly don't recall  
15 vividly the details of that, but I think that--

16                  MR. LYNCH: If I may interrupt the witness,  
17 I have no objection to your refreshing his  
18 recollection.

19                  THE COURT: If you can recall, or if there  
20 is anything that will help refresh your  
21 recollection, I will be glad to make it avail-  
22 able, because that is of critical import here,  
23 or could be.

24                  THE WITNESS: We were arguing that it was  
25 a manslaughter case, and we were trying to

1 have things go along that way. Whereas the  
2 prosecution was arguing that it was murder  
3 first. The fact that they had a confession  
4 from him, that said he was attempting to rob  
5 her, and it was a felony murder.

6 THE COURT: Did they indict him for felony  
7 ~~murder?~~ ONLY COPY AVAILABLE

8 THE WITNESS: No, it was a common law  
9 murder, as I recollect the indictment.

10 THE COURT: And you recall obviously  
11 because you concur in Mr. Rinehart's statement  
12 with the distinction between the degrees, as  
13 far as punishment is concerned was important?

14 THE WITNESS: Yes, sir.

15 THE COURT: But you have no recollection of  
16 the essential elements?

17 THE WITNESS: I think I recall talking to  
18 him in the jail and telling him that if this  
19 was the case it could be murder one; and if  
20 this was the case it could be murder two or  
21 manslaughter, if he had intent and thought it  
22 over beforehand and if he didn't have pre-  
23 meditation it could be manslaughter.

24 THE COURT: Were you in jail with him alone  
25 or with Mr. Rinehart?

1           THE WITNESS: There were times when I was  
2           in jail with Mr. Rinehart, but there were times  
3           I was with him alone.

4           THE COURT: Mr. Rinehart said you talked  
5           to him more.

6           THE WITNESS: Yes. **ONLY COPY AVAILABLE**

7           THE COURT: That you looked up the law and  
8           talked to him more.

9           THE WITNESS: Yes. I think so. I was in  
10          Gloversville and it was closer to the jail.  
11          Mr. Rinehart was in Amsterdam, which is a  
12          little further away.

13          THE COURT: Do you have any records in your  
14          file on that?

15          THE WITNESS: I have it here.

16          THE COURT: Can you examine your file and  
17          see if you have any notes concerning con-  
18          versations.

19          THE WITNESS: I have some. Let me say  
20          this, I have some notes that I took on one  
21          occasion----I know I looked over this last  
22          night. This file has been gone over many  
23          times over the years by attorneys on behalf of---

24          THE COURT: I know there have been a  
25          number of proceedings. I don't want you to

1 think I am being critical. I examined this a  
2 whole lot different today than I would in 1965.  
3 I assure you of that.

4 THE WITNESS: Yes, sir.

5 THE COURT: Today I virtually give them a  
6 ONLY COPY AVAILABLE  
charge.

7 THE WITNESS: Your Honor, I have a note  
8 here of an interview with the defendant, but  
9 I don't seem to place my fingers on it right  
10 now, Judge.

11 THE COURT: Take your time.

12 THE WITNESS: Yes. I find some notes here  
13 that I took on April 26th.

14 THE COURT: April 26th, '65?

15 THE WITNESS: Yes, sir.

16 THE COURT: And what do they---is that in  
17 relation to a conversation? Look them over to  
18 see if they do anything to refresh your  
19 recollection.

20 THE WITNESS: These notes that I have  
21 found, Your Honor, indicate that I took some  
22 of the history from the man but after he got  
23 out of the Rome State School, when he was on  
24 the Apolka Farm first, and that then he went  
25 to the Francisco Farm and with his brother

1                   James and his brother Cliff, and I took their  
2                   addresses so I could talk to them about what  
3                   they knew about it. His brother Stanley---  
4                   he might know some of the details. Those are  
5                   the only notes I have Your Honor.

6                   THE COURT: They don't have anything to do  
7                   with the matter I have inquired about?

8                   THE WITNESS: That is true.

9                   MR. LYNCH: May I continue?

10                  THE COURT: Yes. *ONLY COPY AVAILABLE*

11                  BY MR. LYNCH:

12                  Q         Mr. Best, is it a fair summary of your testimony that  
13                   what you are trying to recall is the events that trans-  
14                   pired back in 1965?

15                  A         Yes, sir.

16                  Q         You have of necessity to rely on your memoranda?

17                  A         That is correct.

18                  Q         Faced, as you and Mr. Kinehart were, with representing  
19                   a client charged with first degree murder and hoping,  
20                   as you did, that you might be able to reduce the charge  
21                   to manslaughter, recognizing the possibility that you  
22                   might end up with murder second, the difference of those  
23                   crimes was important to you?

24                  A         Yes, sir.

25                  Q         In other words, in coming to a conclusion on your

1 chance of success or failure in representing Mr. Morgan  
2 you determined how you best could advise him, it was  
3 important for you that a knowledge of the difference  
4 in the crimes to explain to him the various elements  
5 that would get into one crime as compared to another;  
6 is that a fair statement?

7 A Yes, sir.

8 Q Is it possible that your recollection of the discussion  
9 with Mr. Morgan is a discussion that you had with  
10 him to determine from him what happened so that you  
11 as his lawyer could determine the legal effect of what  
12 happened; is that a possibility?

13 A Well, it certainly is. I know that I tried to develop  
14 out of him---

15 Q Sure. So that the purpose of these discussions was to  
16 permit you as his attorney, and Mr. Rinehart as your  
17 associate, to determine what advice you should give;  
18 is that a fair statement?

19 A Yes, sir.

20 Q And after ten years is it a fair statement that your  
21 recollections of that incident of necessity had to be  
22 vague; am I correct?

23 A Yes.

24 MR. LYNCH: Thank you, Mr. Best. I think  
25 that is all.

1 THE COURT: Anything further? *ONLY COPY AVAILABLE*

2 MR. CASTELLANI: Nothing further.

3 THE COURT: Alright, thank you, Mr. Best.  
4 (Witness excused).

5 MR. LYNCH: If the Court please, the  
6 Petitioner would like to call---

7 THE COURT: Has the Respondent rested?

8 MR. CASTELLANI: Yes, sir.

9 THE COURT: Alright.

10 MR. LYNCH: Mrs. Morgan, please.

11 D O R I S A. M O R G A N

12 called as a witness, in behalf of the Petitioner,  
13 being first duly sworn by the Clerk of the Court,  
14 was examined and testified as follows:

15 DIRECT EXAMINATION

16 BY MR. LYNCH:

17 Q Mrs. Morgan, are you the mother of Timothy Morgan,  
18 sitting here at the counsel table?

19 A I am.

20 Q Were you in the courthouse on the day in 1965, when  
21 your son was sentenced?

22 A I was.

23 Q Do you have any recollection of the events of that day?  
24 I am talking about a conference between the lawyers and  
25 Tim?

1       A     You see I have been to Dr. Savage and at that time I  
2                    was under sedation so that everything--I was there  
3                    but--

4                   THE COURT: You were waving your hands.  
5                   Would you mean to indicate it was confused  
6                   in your mind?

7                   THE WITNESS: Yes.

8       BY MR. LYNCH:

9       Q     And is it correct that you have no recollection  
10                   specifically?

11      A     I could never give any true statements about what was  
12                   said.

13                   THE COURT: And you are now talking about  
14                   the date when your son was sentenced?

15                   THE WITNESS: I think that is probably what  
16                   I am talking about.

17                   THE COURT: Is that what you were asked?

18       BY MR. LYNCH:

19       Q     If I were to ask you about any other times--let me  
20                   put it this way, Mrs. Morgan. This was a terrible  
21                   trying time for you, as Tim's mother?

22      A     Right, and still is.

23       Q     You were very upset throughout this entire period when  
24                   he was first charged with these crimes?

25      A     Yes.

1 Q Are you telling us that you can't assist us here, that  
2 you can't recall what took place during that entire  
3 period?

4 A I am sorry, but that is what it would be.

5 MR. LYNCH: Thank you, Mrs. Morgan.

6 CROSS-EXAMINATION

7 BY MR. CASTELLANI:

8 Q Just one question, Mrs. Morgan. Even though you can't  
9 recall at this time, ten years later what took place  
10 at the time of the date of the sentence or before, is  
11 it possible that you were advised or taken into any  
12 discussions about your son's possibility of pleading?

13 Is it possible that you were?

14 A They (indicating) would know.

15 Q Did you talk to them during the course of these pro-  
16 ceedings before your son was sentenced? Did you talk  
17 to Mr. Rinehart?

18 A I can't remember, truthfully. Honestly.

19 Q Is it possible that you--did you take that much interest  
20 in this matter when you discussed it with your son's  
21 attorneys?

22 MR. LYNCH: I object to the form of the  
23 question as argumentative.

24 MR. CASTELLANI: This is cross-examination.

25 THE COURT: I will let her answer. Can

1                   you recall now whether or not you either  
2                   discussed it or were present during any dis-  
3                   cussions with either you or any other member  
4                   of your family, with either Mr. Best or Mr.  
5                   Rinehart, before your son was sentenced? The  
6                   question is, do you remember being present,  
7                   not what was said on being present?

8                   THE WITNESS: I think we all was.

9                   MR. CASTELLANI: That is all, Your Honor.

10                  MR. LYNCH: Thank you, Mrs. Morgan. That  
11                  is all.

12                  MR. CASTELLANI: If Your Honor please, I  
13                  would like to put on the record that I am  
14                  very grateful to these gentlemen to come all  
15                  the way from Fulton County and Montgomery  
16                  County to testify in this case voluntarily.

17                  THE COURT: Mrs. Morgan, I am going to ask  
18                  you to step down.

19                  (Witness excused).

20                  THE COURT: The Attorney General indicated  
21                  for the record his appreciation for both of  
22                  you gentlemen having appeared voluntarily.  
23                  Of course that goes for the Court as well, as  
24                  to Mr. Schlusberg, the District Attorney. Of  
25                  course the court is interested in determining

1 what the facts are primarily. It is only  
2 through proceedings such as this particular  
3 one when it is remanded by the Court of  
4 Appeals that the Court can make such a  
5 determination, and while I realize in many  
6 instances it creates a substantial imposition  
7 on attorneys and judges that are involved in  
8 these cases and that the courts now are looking  
9 into these in the light of new writings, that  
10 none of us were particularly aware of or con-  
11 cerned about back ten or fifteen years ago,  
12 but as long as they deal with constitutional  
13 matters, of course, this is what this Court  
14 is here for and it is just what the Supreme  
15 Court states we are here for.

16 So I want you all to know that the Court  
17 appreciates your cooperation and it makes it  
18 makes it much more pleasant for us, and when  
19 I say us, I am referring to Judge Foley and  
20 myself, to be able to receive the cooperation  
21 of the local offices, because we have to call  
22 on them--we have these writs and applications  
23 that run into the hundreds--and while most of  
24 them can be disposed of on State Court pro-  
25 ceedings and records, we still have to obtain

1                   them, and it is very often a major job to do  
2                   that, and without the cooperation of the local  
3                   District Attorneys, our work would be multiplied  
4                   many-folds. So spread the word to your  
5                   fellow District Attorneys that we appreciate  
6                   the assistance that we get, when they supply  
7                   us with old records in these cases and briefs,  
8                   and to the lawyers, the Judges that are  
9                   obliged to come in and testify.

10                  Anything further?

11                  MR. LYNCH: Your Honor, I would like to  
12                  make a brief summation.

13                  THE COURT: Evidence closed?

14                  MR. LYNCH: Yes.

15                  THE COURT: Anything further?

16                  MR. CASTELLANI: Nothing further.

17                  THE COURT: Alright. Evidence is closed.  
18                  You can make a brief summation.

19                  MR. LYNCH: If the Court please, as Your  
20                  Honor realizes the Petitioner attacks the  
21                  validity of the sentencing procedure under  
22                  which he is presently confined, on two basic  
23                  grounds. One, that he was not advised of the  
24                  elements of the crime for which he pled and  
25                  was never told of the punishment to which he

1 was exposing himself by the plea.

2 I submit there are two areas of dispute  
3 here. There is, of course, a factual question  
4 of which Your Honor will have to resolve in  
5 which Mr. Morgan says on the one hand he was  
6 not told of the elements of the crime or the  
7 punishment he was going to receive, and then  
8 there is a pure question of law, if you will,  
9 which I submit arises out of the admitted  
10 facts.

11 *ONLY COPY AVAILABLE*  
12 Directing myself briefly to the ultimate  
13 dispute, as I review the evidence in my mind,  
14 the testimony that has been received, it could  
15 be taken at its strongest for the stated self,  
16 that it is clear that this young man was  
17 never advised specifically of the elements of  
18 the crime to which he was contemplating the  
guilty plea.

19 Mr. Rinehart quite candidly said he didn't  
20 get into this kind of discussion with Mr.  
21 Morgan, and as a trial attorney I can't under-  
22 stand that, and I don't mean to be critical  
23 of Mr. Rinehart, but Mr. Morgan is a person of  
24 diminished intellectual capacity.

25 Under the laws of this State---

1                   THE COURT: So that we focus on the same  
2                   area, I won't be concerned with the laws of  
3                   this State. I am concerned with the  
4                   deprivation of constitutional right.

5                   MR. LYNCH: Maybe my terminology was poorly  
6                   chosen. It is our position that the con-  
7                   stitutional right of this young man was not  
8                   given to him in the sense that the plea he  
9                   made was not within the confines of his  
10                  intellectual capacity, because he was not told  
11                  the necessary information. And it is our  
12                  further position that the sentencing court  
13                  had the facts in front of it which under the  
14                  procedural law of the State which addresses  
15                  itself to his constitutional rights, compelled  
16                  that Court to take an action which it didn't  
17                  take. That is the legal question, the factual  
18                  question as to did he have this knowledge. He  
19                  says he did not. And the question of intent  
20                  being a specific element of the crime, Mr.  
21                  Rinehart said he didn't tell him this and Mr.  
22                  Best says he concurs with Mr. Rinehart. He  
23                  has some recollection of the different crimes,  
24                  of the different requirements of the crimes.  
25                  I think Mr. Best honestly recalls distinctly

1           that this conversation, whatever it was, was  
2           not meant for the purpose of limiting this  
3           Petitioner to the element of the crime that he  
4           was charged with that he might plea to or hope  
5           to attain for him. I think that conversation  
6           shows the purpose that Mr. Rinehart and Mr.  
7           Best had, and what they thought they could do  
8           for him. A conversation such as that to a  
9           young man of diminished intellectual capacity  
10          is of no assistance to him to making a judgment  
11          within the ability he has, on June 8, 1965,  
12          some two months later.

13          I say to you that the facts so at the time  
14          he entered the plea, the plea was not volunt-  
15          arily and intelligently made because he never  
16          received the information required to make it.  
17          And furthermore, if you find that there was  
18          some conversation with him some two months  
19          prior that that would of necessity not last  
20          in this young man's mind in that it was in-  
21          cumbent upon him to know at the time of the  
22          plea what the elements of the crime was to  
23          which he was pleading.

24          He said if he knew this he would not have  
25          pled.

1                   The testimony of the State most favorable  
2                   to them is that he didn't know on the question  
3                   of punishment. The only thing I would say, I  
4                   expected Mr. Rinehart to say in answer to my  
5                   question that he told this young man that he  
6                   would receive a sentence of twenty-five years.  
7                   If that is true---

8                   THE COURT: I don't remember that.

9                   MR. LYNCH: I believe there is testimony to  
10                  that effect.

11                  THE COURT: I got the distinct impression  
12                  that the sentence was twenty-five years to  
13                  life, and that Mr. Rinehart knew that and  
14                  advised the defendant. I think at that stage,  
15                  at least, it is my impression that Mr. Rinehart  
16                  was addressing himself to the minimum, that is  
17                  bargaining for the minimum provided by statute.  
18                  I referred to that not knowing that the maxi-  
19                  mum was life, but Mr. Rinehart is still here,  
20                  and if there is any confusion about that, I  
21                  will permit a reopening so the direct question  
22                  can be put to Mr. Rinehart.

23                  MR. LYNCH: I do not object to that pro-  
24                  cedure.

25                  THE COURT: I think that my recollection

1                   which is as fresh now as it would ever be---

2                   MR. LYNCH: I wonder if I could direct a  
3                   question to Mr. Rinehart?

4                   THE COURT: Yes. Mr. Rinehart is already  
5                   sworn. The record may indicate that we re-  
6                   opened to put this question to Mr. Rinehart.

7                   MR. LYNCH: Mr. Rinehart, did you tell Mr.  
8                   Morgan that the sentence he would receive was  
9                   twenty-five years or did you tell him twenty-  
10                  five years to life, or do you know for certain?

11                  MR. RINEHART: I think it was twenty-five  
12                  years. I don't know if I put that "to life"  
13                  in there. I am not sure.

14                  MR. LYNCH: So you may have told him  
15                  twenty-five years?

16                  MR. RINEHART: Yes.

17                  THE COURT: Alright. That is far better  
18                  than having any misunderstanding on the record  
19                  about it.

20                  MR. CASTELLANI: I think this points up--

21                  THE COURT: Now the evidence is closed.

22                  MR. LYNCH: I think this points out that  
23                  this young man inadvertently, I am sure, was  
24                  under a misapprehension of the sentence he was  
25                  going to receive. I can see him saying, "Alright,

1 twenty-five years is one thing, but twenty-  
2 five years to life is something else."

3 And I say the evidence on behalf of the  
4 People on both elements, taken at its highest,  
5 would reflect an overturning of the decision.

6 Turning to the legal aspect and I think I  
7 said it in my brief, I think that the sentence  
8 came at a time when the Court knew that there  
9 was a possibility that this young man may not  
10 have formed the required intent. Let me say  
11 to you, if at that time that Court---

12 THE COURT: Well the intent, I think there  
13 is a factual basis from the evidence where it,  
14 that is the jury would have a right to infer  
15 on the mere fact, I think when he hit her  
16 first and then used the knife, that there were  
17 multiple knife wounds, that the jury could  
18 infer, and as a matter of fact, I think from  
19 those same facts the Judge would have to permit  
20 the jury to decide as a question of fact  
21 whether there was premeditation on first degree  
22 murder, so that this man was a long way short  
23 of being out of the woods.

24 So I am satisfied that there was a  
25 factual basis for the entry of the plea.

I am satisfied that the bargaining was an exercise of good judgment and caution, particularly when counsel referred to the emotional atmosphere prevailing in the community and the refusal of a change of venue, but I don't think we need address ourselves to that because in any event that is not before the Court. This is not one of the grounds here. And I don't know if it were, whether that has been exhausted in the State Court.

MR. LYNCH: I think it is in the sense that the procedures that the New York State Common Law prosecute for situations of this nature really are merely procedural methods in which you satisfy yourself, if you were the sentencing Judge, that the plea is voluntarily and intelligently made. Here is a Judge who is alerted to the possibility that the crime that is being pled to, the elements, may not exist. I am not suggesting that the jury may not have found those elements. At that point the Court has to determine if the defendant knew what he was doing.

THE COURT: Well, at that point, of course, Boykin had not been decided. Boykin is not

1                   retroactive. So that Judge Soden did not have  
2                   to spread on the record this man's intelligent  
3                   waiver or the voluntariness of his plea if it  
4                   appeared to him. Now that should have appeared  
5                   through some other sources, but I don't know.  
6                   Is it any place in the facts before me? It is  
7                   no place except in the testimony I have. But  
8                   I think we can confuse the duty of a Judge  
9                   since Boykin and prior to Boykin. The trial  
10                  judge had a different duty imposed. Now a  
11                  corum nobis judge has another proposition,  
12                  whether or not he was obliged to do what I had  
13                  been ordered to do, which is hold a hearing.  
14                  And that is what this hearing is all about.  
15                  I think it focuses down on the circumstances  
16                  of whether this is a voluntary plea.

17                  I didn't mean to cut you off.

18                  MR. LYNCH: I have called to the Court's  
19                  attention those aspects of the evidence and  
20                  the law that I deem important in making your  
21                  decision.

22                  THE COURT: Alright. I will hear Mr.  
23                  Castellani.

24                  MR. CASTELLANI: Briefly, I would have  
25                  reference to the mandate of the Circuit Court

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1 to this Court that the issues should be con-  
2 fined.

3 THE COURT: Well, I don't think that they  
4 say the issues should be confined.

5 MR. CASTELLANI: Without spelling it out  
6 here.

7 THE COURT: They pointed out to me a couple  
8 of things I should not forget.

9 MR. CASTELLANI: Well, yes, intent and the  
10 severity of the punishment. Certainly the  
11 testimony today bears out that he had an  
12 intent, and that he knew that the punishment  
13 would be at least twenty-five years. And I  
14 think the testimony definitely corroborates  
15 your decision of December 26 in this case when  
16 you denied the original application when you  
17 said after examination of all the facts herein  
18 and consideration of all the circumstances  
19 surrounding the taking of the plea, I am  
20 convinced that Morgan made a choice voluntarily,  
21 and asked prior advice by competent counsel  
22 and with the recognition that such choice  
23 would result in a prison term.

24 THE COURT: I think he did have that  
25 choice and that it would result in a prison

1 term, his own papers show that. The Court  
2 of Appeals indicated that he didn't make  
3 enough of a reasonable choice. That is why  
4 they sent it back. That is on the papers he  
5 didn't make enough of a reasonable choice and  
6 they thought that the papers didn't support  
7 the conclusions that I drew from them. And I  
8 find no fault with that judgment or remand.

9 It is a difficult thing when you see the  
10 Judge who made the effort in 1965, Judge Soden,  
11 made an effort to be fair. He is, of my own  
12 knowledge, one of the most imminent  
13 practitioners in criminal law, in that part  
14 of the State assigned to him and you see  
15 sincere efforts being made to protect his  
16 rights, and then you are confronted with the  
17 situation some years later where his friends  
18 in Auburn fine-tooth-combing the record,  
19 probably erroneously, relying upon Boykin, find  
20 that the record doesn't spread out the things  
21 that Boykin requires and the research on their  
22 part doesn't show that Boykin is not retro-  
23 active.

24 However, the man has raised what may be a  
25 constitutional mal-deficiency in his conviction.

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1           That is what this Court is here for.

2           I think you gentlemen, I think you made no  
3           findings of facts and you probably could go  
4           over the record minutes here and embody them  
5           both together, together with the Petitioner's  
6           petition. So I will need whatever help you  
7           gentlemen can give me on the legal questions.  
8           I think it would help if we assume, that if  
9           you fellows assume that plea bargaining was  
10          entered into in good faith, and that the best  
11          bargain available was made, and that it was  
12          made by competent attorneys, and there is some  
13          inference in the moving papers questioning  
14          the competency, but I don't think it is even  
15          necessary for me to pass on it. If it was, I  
16          will find against the Petitioner on that  
17          particular score.

18          But assume that he was indicted with first  
19          degree murder, and as a result of plea bargaining  
20          he was aware that a sentence of twenty-five  
21          years was going to be imposed, that with that  
22          knowledge, twenty-five years was going to be  
23          imposed on the entry of a plea of guilty to  
24          second degree murder. That no one outlined to  
25          him the distinctions or the differences in the

1                   essential elements between first and second  
2                   degree murder. In fact, assume that no one  
3                   explained the elements of either first or  
4                   second degree murder, except as they related  
5                   to differences in punishment. With that  
6                   exception, assume that the plea is involuntary.  
7                   With those two omissions would they result in  
8                   an involuntary plea as a matter of violation  
9                   of the Fourteenth Amendment, being due  
10                  process. I don't know off-hand the case that  
11                  fits into the exact factual pattern, where a  
12                  man knew essentially what the sentence was  
13                  going to be, except I misunderstood Mr. Rine-  
14                  hart's testimony with regard to the maximum,  
15                  which makes a difference.

16                  That would be helpful to me. Can you  
17                  gentlemen give me whatever law you can get on  
18                  that.

19                  MR. LYNCH: Certainly, Your Honor.

20                  THE COURT: Of course, I have not had much  
21                  to do with murder cases. The little that I  
22                  did have to do caused me to wonder very much  
23                  if there was any difference between murder  
24                  first and second degree.

25                  If the conviction is set aside and the man

1           is allowed to re-plead, I think we can pretty  
2           well prognosticate what the results of that  
3           would be and of course he has served so much  
4           time already, he must be nearing the time when  
5           his eligibility for parole comes up. But those  
6           considerations are not for me.

7           But you can help me gentlemen, if you can  
8           home in on that fine question.

9           Would ten days be sufficient?

10          MR. LYNCH: Yes, Your Honor.

11          THE COURT: Alright, thank you. And the  
12         State has not given me any suggested findings  
13         of fact. I would appreciate those.

14          MR. CASTELLANI: Yes, Your Honor.

15          THE COURT: The Petitioner is remanded to  
16         the custody of the Marshal for return to the  
17         State Institution.

18          Mr. Morgan, I want to say to you that you  
19         had good representation then and you have good  
20         representation now.

21          MR. LYNCH: Thank you, Your Honor.

22          THE CLERK: Court stands in recess to  
23         Chambers.

24           - - - - -

25          (Whereupon the above-entitled matter was

1                             concluded).

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3                             \* \* \*

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1                   REPORTER'S CERTIFICATION

2  
3                   I, F. ROBERT JORDAN, Official Court Reporter  
4                   for the United States District Court, in and for the  
5                   Northern District of New York, do certify that this  
6                   is a true and accurate transcription of the steno-  
7                   graphic minutes as made by me during the aforesaid  
8                   proceedings.

9  
10                  *F. Robert Jordan*

11                  OFFICIAL COURT REPORTER  
12                  United States District Court  
13                  Northern District of New York

14                  Albany, New York

15                  January 10, 1975

21  
22  
23  
24  
25

Minutes of Arraignment, April 15, 1965.

1 STATE OF NEW YORK

2 SUPREME COURT - FULTON COUNTY

3

4 The People of the State of New York

5 - against -

6 TIMOTHY GORDON MORGAN

7 ONLY COPY AVAILABLE

Defendant

8

9 STENOGRAPHIC MINUTES of proceedings had in

10 the above entitled action before HON. HAROLD R. SODER, JUSTICE

11 on Thursday, April 15, 1965, at a Trial Term of Supreme Court

12 held in and for the County of Fulton, at the Courthouse in

13 Johnstown, New York.

14 A P P E A R A N C E S:

15 M. ANDREW SCHLESBERG, ESQ., District Attorney

16 THOMAS PERSECO, ESQ., Ass't. District Attorney

17 FOR THE PEOPLE OF THE STATE OF NEW YORK

18

19 (Appointments for the Defendant as hereinafter noted)

20

21 MR. SCHLESBERG: Your Honor, we are ready

22 to proceed with the arraignment of the People against

23 Timothy Gordon Morgan.

Minutes of Arraignment, April 15, 1965.

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1                   (The defendant appeared before the Court)

2                   MR. SCHLUSBERG: Your Honor, the Grand Jury  
3                   of the County of Fulton, on the 13th day of April 1965  
4                   has returned an indictment against this defendant, charging  
5                   him with the crime of Murder in the First Degree. He stands  
6                   here before you!!

7                   THE COURT: Are you Timothy Gordon Morgan?

8                   THE DEFENDANT: Yes sir.

9                   THE COURT: It is my duty to inform you  
10                  that you have been indicted by the Grand Jury of Fulton County  
11                  for a crime, upon conviction of which you might have to pay  
12                  with your life, or imprisonment in a state prison for a  
13                  considerable period of time. Do you have an attorney?

14                  THE DEFENDANT: Yes sir.

15                  THE COURT: Did you hire an attorney?

16                  THE DEFENDANT: No.

17                  THE COURT: Do you have any financial  
18                  means to pay for an attorney?

19                  THE DEFENDANT: No.

20                  THE COURT: You mean you asked somebody to  
21                  represent you for nothing, is that it?

22                  THE DEFENDANT: I didn't ask nobody.

23                  THE COURT: You didn't ask anybody. Do you

Minutes of Arraignment, April 15, 1965.

1 wish this Court to appoint an attorney for you.

2 THE DEFENDANT: No, I got Reinhart and  
3 another guy.

4 THE COURT: You got Reinhart, you say,  
5 and who else?

6 THE DEFENDANT: That guy (pointing) right  
7 there.

8 THE COURT: Another fellow over here?

9 THE DEFENDANT: Yes.

10 THE COURT: You mean you have consulted  
11 with them?

12 THE DEFENDANT: Yes. The other judge  
13 said they could be my lawyers.

14 THE COURT: The other judge said that.

15 THE DEFENDANT: Yes.

16 THE COURT: Well, you're here before me  
17 now. Are those the men that you want to represent you?

18 THE DEFENDANT: Yes.

19 THE COURT: Would you like me to appoint  
20 them for you?

21 THE DEFENDANT: Yes sir.

22 THE COURT: Would you point out the men  
23 that you talked to, over here?

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Minutes of Arraignment, April 15, 1965.

1                   THE DEFENDANT: (pointing) That guy with  
2 glasses.

3                   THE COURT: Is that the man that you talked  
4 to?

5                   THE DEFENDANT: Yes.

6                   THE COURT: And did you also talk to Mr.  
7 Reinhart?

8                   THE DEFENDANT: Yes.

9                   THE COURT: Do you know who he is?

10                  THE DEFENDANT: Yes, right there.

11                  THE COURT: Well, if that is your choice  
12 of attorneys, and I think at least you know how to select  
13 attorneys, I will grant you that, they are both very  
14 competent men, I will appoint them for you.

15                  THE DEFENDANT: Okay.

16                  THE COURT: You need them.

17                  THE DEFENDANT: I know.

18                  THE COURT: I will appoint Mr. Floyd  
19 Reinhart and Robert Best to represent you.

20                  (Both attorneys appeared before the Court and stood  
21 at the side of the Defendant)

22                  MR. SCHLUSBERG: Your Honor, may I at  
23 this time read the indictment in the defendant's presence and

Minutes of Arraignment, April 15, 1965.

5

1 in the presence of his attorneys.

2 THE COURT: Yes.

3 MR. SCHLUSBERG: The Grand Jury of the  
4 County of Fulton, New York, by this indictment, accuse the  
5 defendant of the Crime of MURDER IN THE FIRST DEGREE,  
6 committed as follows:

7 The Defendant, in the County of Fulton, New York,  
8 on or about the 7th day of April 1965, willfully, feloniously  
9 and of malice aforethought, stabbed and cut Ada Francisco  
10 with a dangerous knife, thereby inflicting divers wounds and  
11 injuries upon the said Ada Francisco, and that thereafter,  
12 on or about the 7th day of April 1965, the said Ada Francisco  
13 died of said wounds and injuries, said killing being  
14 inexcuseable and unjustifiable.

15 May the record show I am handing a copy of  
16 the indictment to his attorneys.

17 THE COURT: You don't mind taking your  
18 hands out of your pocket, do you, in front of the Court)?

19 (the Defendant did so)

20 THE COURT: You are entitled to a jury  
21 trial of this indictment, and you are entitled to subpoena  
22 witnesses in your own behalf, and produce whatever evidence  
23 you feel is necessary in your defense. You are not entitled

Minutes of Arraignment, April 15, 1965.

6

1 to bail. I advise you that a plea of guilty to this indictment---  
2 of course which you can't do in Murder First, you could  
3 in some other crimes---that is the same as being tried by a  
4 jury and convicted at their hands, thereafter. And of  
5 course it is my duty also, under the law, regardless, to  
6 advise you that if you have heretofore been convicted of  
7 a crime, and if you are now convicted of this crime or some  
8 other crime under this degree, you may expect greater  
9 punishment than you would have received if you hadn't been  
10 heretofore convicted. Do you understand what I have told  
11 you?

12 THE DEFENDANT: No, I don't.

13 THE COURT: You don't. Well, I'm going  
14 to try once more. You can't plead guilty to Murder First.  
15 But you could possibly plead guilty to some crime below  
16 Murder First, I don't know, I'm not anticipating anything.  
17 I am just advising you of your rights. If you say you are  
18 guilty to a crime in connection with this indictment, it  
19 is the same as having been tried by twelve people in a jury  
20 box, and being convicted by them. Do you understand that?

21 THE DEFENDANT: Yes.

22 THE COURT: By saying you're guilty, it's  
23 the same as being convicted. Do you understand that now. Is

Minutes of Arraignment, April 15, 1965.

1 that clear to you?

2 THE DEFENDANT: Yes sir.

3 THE COURT: All right. Now, also I  
4 advise you that in case this charge ever gets to any kind of  
5 charge where you could plead, that if you have heretofore  
6 been convicted of some crime before this, if you have been  
7 convicted of a crime and you are convicted of any other crime  
8 under Murder First, either by a jury or by saying you are  
9 guilty, do you understand that, that you may get greater  
10 punishment in that event than you would have received if  
11 you hadn't been heretofore convicted of a crime. Do you  
12 understand that now? In other words, this might be your  
13 second conviction. And if this is a second conviction  
14 either by a trial or by a plea, you have a chance under the  
15 law to get greater punishment than if it was your first  
16 conviction. Do you understand that now.

17 (the defendant shook his head in the negative)

18 THE COURT: Well, that is the best I  
19 can do. Now, Mr. Schlusberg ---?

20 MR. SCHLUSBERG: Well, he has been  
21 arraigned, and I think it is for your Honor to adjourn  
22 it to such time as you would like, to have a date fixed  
23 for trial, or of course such other proceedings.

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Minutes of Arraignment, April 15, 1965.

1                   MR. REINHART: I would like to be heard  
2 before a date is set, your Honor. I assume that there has  
3 been a plea of not guilty entered on the record, sir.

4                   THE COURT: Yes.

5                   MR. REINHART: This defendant had been  
6 confined for some time prior, heretofore, to the Rome State  
7 School for Mental Defectives, and we are making an application  
8 before this Court as soon as we can to get permission to  
9 examine those records.

10                  We would also like a psychiatric examination  
11 and we'll make an application in due course for that. Then,  
12 by reading the papers, Mr. Best, who is a resident up here,  
13 informs me there were some statements made in the paper  
14 as to what the defendant told the District Attorney orally  
15 and in writing. And so I assume that Mr. Best and I will  
16 make a motion to investigate that, and have the Court pass  
17 upon that, to see whether or not that was a voluntary  
18 statement made, or what the circumstances were surrounding it.  
19 So we'll need some time in this matter, as Your Honor under-  
20 stands, I know.

21                  THE COURT: I can readily understand that,  
22 Mr. Reinhart. I will expect that you will make an application  
23 with all due speed for the matters that you just indicated

Minutes of Arraignment, April 15, 1965.

9

1 to the Court. I will cooperate with you at any hour of the  
2 day or night in that regard.

3 MR REINHART: I know.

4 THE COURT: When I'm here. You can come  
5 into this court at any time you want, and even though there  
6 is a trial on, we'll take a recess. Of course you realize  
7 that I'm scheduled to hold a term in Schenectady county next  
8 month, and I can't be in two places at one time. The  
9 earliest I could try this case would be in June of this year.  
10 And I hope that with the good cooperation that you will give  
11 the People of the State, Mr. Schlusberg, and the Court, that  
12 all the preliminaries that are necessary will be disposed of  
13 by the first part of June, so that we don't go into the  
14 summer if we have to try this case. Now, if there is any-  
15 thing else that you feel that the Court should know, why  
16 you advise me and I will be glad to hear it.

17 MR. REINHART: We would like to consult  
18 with Mr. Schlusberg as to a date that would be satisfactory  
19 to him, and then submit that to you and see if that meets with  
20 your approval. The first motion has got to be on the  
21 records from the Rome State School.

22 THE COURT: I will grant that motion,  
23 you don't have to have any doubt about that. If this man has

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Minutes of Arraignment, April 15, 1965.

1 that kind of a history, he should have every advantage to  
2 have his counsel read it, and understand it for his own  
3 protection. That is what the law is in this state. To  
4 protect all people.

5 MR. REINHART: Now, he was committed up  
6 there by the Children's Court, which is now the Family Court  
7 of Fulton County, and of course we would like the records  
8 in the Fulton County Family Court also, if we may have them,  
9 sir.

10 THE COURT: I will order any records for  
11 you. Just make your papers out and submit them.

12 MR. SCHLUSBERG: I am not going to voice  
13 any objection to these two motions, that is, the one about  
14 the records or the one seeking the psychiatric examination  
15 at any time. When counsel wants the motion returnable,  
16 I'll be available.

17 THE COURT: I didn't hear you say anything  
18 about the third one.

19 MR. REINHART: I assume he's consenting to  
20 that, as to the alleged statements made orally, or in  
21 writing. We would like to have a copy of that statement  
22 that was made to you by the defendant.

23 MR. SCHLUSBERG: Well, as to that, I

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Minutes of Arraignment, April 15, 1965.

1 think, perhaps, a motion ought to be, perhaps, made by the  
2 attorneys, so that I can see the moving papers.

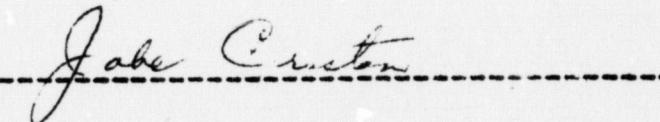
3 THE COURT: All right.

4 MR. SCHLUSBERG: But as to the psychiatric  
5 examination and the others, I have no objection.

6 THE COURT: All right. Prepare your  
7 papers. I'll remand you to the Sheriff!

8 -----  
9 STENOGRAPHER'S CERTIFICATE

10 I, Jobe Croston, an Official Stenographer of the New York  
11 Supreme Court, Fourth Judicial District, do hereby Certify  
12 that I recorded stenographically the foregoing proceedings,  
13 at the time and place mentioned, and the preceding is a true  
14 and correct transcript.

15  
16   
17 -----  
18  
19  
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Minutes of Plea, June 8, 1965.

1 STATE OF NEW YORK

2 SUPREME COURT - FULTON COUNTY

3 -----  
4 The People of the State of New York

5 - against -

6 TIMOTHY CORDON MORGAN

7 Defendant  
8 -----

9 STENOGRAPHIC MINUTES of proceedings had in  
10 the above entitled action before HON. HAROLD R. SODEN, JUSTICE  
11 on Tuesday, June 8, 1965, at a Special Term of Supreme Court  
12 held in and for the County of Fulton, at the Courthouse in  
13 Johnstown, New York.

14 APPEARANCES:

15 H. ANDREW SCHLESBERG, ESQ. District Attorney

16 THOMAS PERSICO, ESQ., Ass't. District Attorney

17 FOR THE PEOPLE OF THE STATE OF NEW YORK

18 FLOYD J. REINHART, ESQ.

19 RONERT P. DEST, ESQ.,

Attorneys and Counselors at Law

20 APPEARING FOR THE DEFENDANT

21 (The defendant is also personally present in the courtroom)

Minutes of Plea, June 8, 1965.

1                   THE COURT: Have the record show that the  
2 defendant is in court personally, and that he is represented  
3 by his attorneys, and that the District Attorney and the  
4 Assistant District Attorney are present. I understand,  
5 gentlemen, there is a change in the situation.

6                   MR. REINHART: There is, your Honor. I  
7 am one of the attorneys for the defendant Timothy Gordon  
8 Morgan, and on behalf of the defendant, whom I am authorized  
9 to speak for, we now offer to plead guilty to Murder in the  
10 2nd Degree, in full satisfaction of the indictment which  
11 charges Murder in the First Degree, found by the Grand Jury of  
12 Fulton County against this defendant, Timothy Gordon Morgan.

13                  THE COURT: Mr. District Attorney?

14                  MR. SCHLUSBERG: Your Honor, since the  
15 Grand Jury of this county returned an indictment against this  
16 defendant, charging him with the crime of Murder in the First  
17 Degree, the Legislature of the State of New York has passed  
18 a bill, already signed by the Governor, abolishing the death  
19 penalty in this state, except in two specific instances.  
20 This case does not fall within either of those two exceptions,  
21 so that even in the event of a conviction of Murder in the  
22 First Degree after a trial, a prison sentence would be the only  
23 punishment which this Court could mete out to this defendant.

Minutes of Plea, June 8, 1965.

1                   Mr. Persico and I have given great thought  
2                   to the request of the defendant that he be permitted to plead  
3                   to the crime of Murder in the Second Degree. The doctors at  
4                   the Utica State Hospital, following a lengthy psychiatric  
5                   examination of this defendant, have found him fully competent  
6                   to stand trial, capable of understanding the charge against  
7                   him, and of assisting in his defense. I am mindful of the  
8                   fact that there were no eyewitnesses to the actual crime.  
9                   And from the many motions made on behalf of this defendant, it  
10                  is apparent that a lengthy trial would ensue if a plea of  
11                  guilty were not accepted. This would entail and incur a great  
12                  amount of expense to the county of Fulton, and no one can  
13                  foretell what the verdict of a jury would be after a trial.

14                  Since it is the desire of the District  
15                  Attorney's office that society be protected from this defendant:  
16                  and that there be no repetition of this act by him, it is  
17                  earnestly submitted to this Court that the welfare of the public  
18                  and the ends of Justice will have been fully met by the  
19                  acceptance of a plea and resultant conviction of the defendant  
20                  of the crime of Murder in the Second Degree.

21                  For these reasons, I respectfully recommend  
22                  the acceptance of the defendant's request that he be permitted  
23                  to plead guilty to the crime of Murder in the Second Degree.

Minutes of Plea, June 8, 1965.

1 And, your Honor, in compliance with the provisions of the Code  
2 of Criminal Procedure, I am filing this statement, setting  
3 forth the reasons on the part of the District Attorney's office  
4 for its consent to the reduction of the charge from Murder  
5 First to Murder Second.

6 THE COURT: And I assume, Mr. District  
7 Attorney, that you recommend this to the Court?

8 MR. SCHLUSBERG: I do.

9 THE COURT: And that you go along with it?

10 MR. SCHLUSBERG: Yes, I do.

11 THE COURT: Would you have the defendant  
12 approach the bench.

13 (The defendant, together with both of his attorneys,  
14 appeared before the Bench)

15 THE COURT: You are Timothy Gordon Morgan?

16 THE DEFENDANT: Yes sir.

17 THE COURT: I know you have been in court  
18 with your attorneys when these statements have been made by  
19 your counsel, Floyd Reinhart, and you have heard, I assume,  
20 the District Attorney's statement?

21 THE DEFENDANT: Yes.

22 THE COURT: Is that correct?

23 THE DEFENDANT: Yes.

X

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Minutes of Plea, June 8, 1965.

1                   THE COURT: You have to speak up so this  
2 man can take it down. I realize that, unfortunately, you  
3 have a low intelligence quotient, and I want to make sure,  
4 as a Court, that you understand the charge and what is  
5 happening here, and that YOU understand it, not your  
6 attorneys. Do you understand that you are formally charged,  
7 at the moment, by the Grand Jury of Fulton County, for the  
8 Crime of Murder in the First Degree, upon conviction of which  
9 you could be incarcerated for the rest of your life? Do you  
10 understand that??

11                  THE DEFENDANT: Yes sir.

12                  THE COURT: Do you understand that you  
13 are accused of killing one, Ada Francisco in this county,  
14 is that true? Do you understand that?

15                  THE DEFENDANT: Yes sir.

16                  THE COURT: Do you understand that what  
17 has occurred here in this courtroom in the last few minutes  
18 is a statement by your counsel, whom you requested to  
19 represent you, is that true?

20                  THE DEFENDANT: Yes sir.

21                  THE COURT: And that you plead guilty  
22 to a lesser charge, that is, Murder in the Second Degree,  
23 and that that be in full satisfaction of the indictment

Minutes of Plea, June 8, 1965.

1 charging you with Murder in the First Degree, do you understand  
2 that? Do you understand that if you plead to Murder Second  
3 then the charge of Murder First is not, thereafter, against you.  
4 It is not made against you. It would be in satisfaction of  
5 that or in place of that. Do you understand that?

6 THE DEFENDANT: Yes.

7 THE COURT: Do you understand, also,  
8 that as I advised you of your rights when you were arraigned,  
9 that a plea of guilty to any crime is the same thing as having  
10 been tried by a jury and, after a trial, convicted by a jury.  
11 Do you understand that?

12 THE DEFENDANT: Yes sir.

13 THE COURT: It is just as though you had  
14 people in that box, and they had heard all the evidence, and  
15 then they had come out with the statement of guilty against you  
16 for Murder Second Degree. Do you understand that?

17 THE DEFENDANT: Yes sir.

18 THE COURT: Now, with that understanding,  
19 and having heard your attorneys, and having heard the District  
20 Attorney, what do you plead to, personally?

21 THE DEFENDANT: Guilty.

22 THE COURT: Guilty to what?

23 THE DEFENDANT: Second Degree.

Minutes of Plea, June 8, 1965.

1 THE COURT: Second Degree what?

2 THE DEFENDANT: Murder.

3 THE COURT: And that is your plea??

4 THE DEFENDANT: Yes sir.

5 THE COURT: And this you do voluntarily  
6 and upon the advice of your counsel, is that true?

7 THE DEFENDANT: Yes sir.

8 THE COURT: Do you understand fully  
9 what you are doing?

10 THE DEFENDANT: Yes sir.

11 THE COURT: Do you understand, also, that  
12 if I accept that plea, that I must sentence you from this  
13 Bench to prison? Do you understand that?

14 THE DEFENDANT: Yes sir.

15 THE COURT: Under the law, we must have  
16 a probation officer's report, which I must read and study  
17 before I sentence this defendant. I understand that the  
18 probation officer of Fulton County is in the courtroom, is  
19 that true?

20 PROBATION OFFICER: (Mr. Burton Lesser) Yes  
21 sir.

22 THE COURT: I assume it will take you some  
23 time to make that report, sir.

Minutes of Plea, June 8, 1965.

1 PROBATION OFFICER: Yes sir.

2 THE COURT: Would June 15, 1965 at 9:30  
3 o'clock in the morning be a sufficient time within which you  
4 could make that report in writing to this Court?

5 PROBATION OFFICER: It would, sir.

6 THE COURT: Do you feel you could do that?

7 PROBATION OFFICER: Yes, I do.

8 THE COURT: Is it agreeable to the defense  
9 counsel and also to the District Attorney's office that the  
10 sentencing be set for Timothy Gordon Morgan in this courtroom  
11 at 9:30 a.m. June 15, 1965.

12 MR. REINHART: That's satisfactory, your  
13 Honor.

14 MR. SCHLUSBERG: Yes, your Honor.

15 MR. BEST: I will not be able to be  
16 present on that date.

17 THE COURT: Well, it's only the matter of  
18 the sentence now, Mr. Best.

19 MR. REINHART: I assume on this plea you  
20 are adjudicating him guilty of Murder in the Second Degree.

21 THE COURT: I'm going to accept the plea  
22 in a moment.

23 MR. SCHLUSBERG: That is satisfactory to

Minutes of Plea, June 8, 1965.

1 me, your Honor.

2 THE COURT: I'm sorry, Mr. Best, that you  
3 can't be here, but I don't see the essential nature of you  
4 being here at that time as long as Mr. Reinhart is.

5 MR. REINHART: I will be here, sir.

6 THE COURT: On that understanding and the  
7 statements I have made in the presence of the defendant and  
8 the presence of his counsel, I will accept the plea of  
9 guilty by the defendant personally to Murder Second Degree  
10 in full satisfaction of any and all crimes that could be  
11 charged against him in this indictment charging him of  
12 Murder First Degree submitted by the Grand Jury of Fulton  
13 County on April 13, 1965. And I will adjourn this matter  
14 until the time and hour set on June 15th.

15 MR. REINHART: Let the record show the  
16 mother of the defendant and his two brothers are in the court-  
17 room at this time here, sir.

18 THE COURT: That's all right. And I  
19 will remand you to the custody of the Sheriff. -4-

20 MR. REINHART: Do you want his statement  
21 now, Judge?

22 THE COURT: No, I think the statement  
23 should be made at the time of sentencing.

Minutes of Plea, June 8, 1965.

1                   MR. REINHART: All right, sir.

2                   THE COURT: Because there could be some  
3 change between then and now, and I think it is better to have  
4 it at that time. We'll take the history at that time and  
5 the probation report, and I will make the sentence at that  
6 time.

7                   MR. REINHART: June 15th at 9:30 a.m.

8                   THE COURT: Yes. And I think this  
9 should be filed with the minutes.

10                  MR. SCHLUSBERG: Yes, your Honor.

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Sentencing

Minutes of Sentencing, June 15, 1965.

1 STATE OF NEW YORK

2 SUPREME COURT - FULTON COUNTY

3

4 The People of the State of New York

5 - against -

6 TIMOTHY GORDON MORGAN

7 Defendant

8

9 STENOGRAPHIC MINUTES of proceedings had in  
10 the above entitled action before HON. HAROLD R. SODEN, JUSTICE  
11 on Tuesday, June 15, 1965, at a Trial Term of Supreme Court  
12 held in and for the County of Fulton, at the Courthouse in  
13 Johnstown, New York.

## 14 A P P E A R A N C E S:

15 H. ANDREW SCHLUSBERG, ESQ., District Attorney

16 THOMAS M. PERSICO, ESQ., Ass't. District Attorney

17 FOR THE PEOPLE OF THE STATE OF NEW YORK

18 FLOYD J. REINHART, ESQ.  
19 Attorney and Counselor at Law  
Kresge Building  
20 Amsterdam, New York

21 APPEARING FOR THE DEFENDANT

22 (The defendant was personally present in court)

23

Minutes of Sentencing, June 15, 1965.

1 MR. SCHLUSBERG: Your Honor, the People  
2 are ready to proceed in the case of the People against Tammie  
3 Gordon Morgan!

MR. REINHART: The defendant is ready.

5 MR. SCHLUSBERG: Your Honor, on the 8th  
6 day of June 1965, this defendant appeared in person and with  
7 his attorneys, Floyd Reinhart and Robert Best, at which time  
8 he pled guilty to the crime of Murder in the Second Degree in  
9 full expiation of the indictment. At that time, you adjudicated  
10 him guilty and adjourned the matter to this time and place for  
11 sentence.

12 THE COURT: May the record show that the  
13 prisoner is here in person, and is represented by Mr. Reinhart.  
14 Is there anything you would like to say at this time, Mr.  
15 Reinhart?

16 MR. REINHART: Yes, I would like to make  
17 a statement to the Court upon my activities in this case, what  
18 my investigation showed, and our interrogation of the defendant  
19 and what that revealed, and also our interrogation of the  
20 various witnesses who were involved in this situation.

21 It's been a most difficult assignment, sir  
22 This boy comes from a nice family with several other children;  
23 none of them have ever been in any trouble, and all of them are

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Minutes of Sentencing, June 15, 1965.

1 energetic and hardworking. He has a nice mother who is  
2 concerned with him, of course. But it all goes back to his  
3 school days. Apparently he had trouble in school, and he  
4 is satisfied that the extent of his education is his ability to  
5 write his name. He's unable to read or write. He makes a  
6 nice appearance and is well formed and athletic looking young  
7 man. But apparently somewhere along the line he developed  
8 an ungovernable temper which got him into trouble, and the  
9 trouble started with his principal in Mayfield High School.  
10 At that time he was in the 7th Grade. He had been promoted  
11 along, I assume, because of his size, and to do away with any  
12 embarrassment of being with smaller children, although he  
13 certainly was not qualified to be in that grade.

14                   He finally was committed up to the Rome  
15 State School and classified there as retarded. Now, they took  
16 various tests in that school, which we obtained through a court  
17 order to show what his mentality was, and it was classified  
18 at different levels by the psychiatrists and psychologists  
19 who examined him. Some of them had it as low as 40 and others  
20 had it as high as 75, but even 75 would be regarded in society  
21 as very low, so that his intelligence quotient was nothing  
22 as to what it should have been.

23                   Now, there is a history of belligerency

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Minutes of Sentencing, June 15, 1965.

1 in the Rome School, with various arguments, disputes and fist-  
2 fights and quarrels. Finally, about two years ago, he was  
3 released to go to work on a farm. It was felt that he could  
4 be of some value to society by working on a farm. Well, he  
5 arrived at the farm and he worked there for a while, but trouble  
6 occurred then between his employer and himself, and which  
7 resulted in many fistfights. And then he went to work for  
8 Mrs. Ada Francisco who was a neighbor and who liked the young  
9 man, apparently, and felt she could develop something with him.

10 Sometimes as we go through life, we meet  
11 and become impatient with people who have infantile minds  
12 that don't grasp the situation as readily as we do. And that  
13 is true of all of us. We try to explain something which is  
14 apparent to us, and if it doesn't seem to get through to our  
15 listener, we seem to run out of patience and take a different  
16 attitude entirely, once that is almost hostile.

17 Now, he worked there on the farm and his  
18 wages, of course, were very low, but he was conservative, and  
19 Mrs. Francisco kept his money for him. He gave it to her, and  
20 she had it on this night in question of April 6, 1965. He  
21 became interested in a young lady in the village of Tribes Hill  
22 some few miles away, and he would go down there to see her on  
23 his bicycle. His behavior was excellent. No doubt about that.

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Minutes of Sentencing, June 15, 1965.

1 Apparently they got along very well with each other. They  
2 had seemed to regard him well, there. But of course, under  
3 the rules of the Rome State School, he was supposed to be back  
4 in at ten o'clock at night.

5 Well, with a young man, you know that time  
6 goes pretty fast, especially if you're with somebody you like,  
7 especially a young lady. One or two occasions he arrived home  
8 after the hour of ten o'clock. Mrs. Francisco, the evidence  
9 shows, on at least one occasion slapped him, which was a  
10 mistake. She had no right to do that. That took place a  
11 couple of days before this incident of April 6, 1965, and that  
12 developed a hostility, and on this day in question, she  
13 threatened that she was going to send him back to the Rome State  
14 School. Now, that probably wouldn't have carried such a  
15 terrific threat with it, except for the fact that now having  
16 met this young lady and apparently being enamored of her, he  
17 started to dwell upon that, and with the mind and intelligence  
18 quotient that he has, he started to ponder over the thing.  
19 It had an effect that we, probably, in later life, would look  
20 back and smile about, but here we are dealing with someone  
21 with an intelligence quotient or the mentality of an eight or  
22 nine year old, and so that assumed terrific proportions.

23 So, brooding over that, and brooding over

## Minutes of Sentencing, June 15, 1965.

1 the fact that he was going to have to be put back up there in  
2 the Rome State School, on this 6th day of April 1965, he went  
3 down into the room of his employer, Mrs. Ada Francisco, and  
4 He took a knife with him, of course, but I'm sure that our  
5 investigation shows that at that time, he meant no harm to that  
6 lady. She had his money. She had his cash which he had earned  
7 and which he wanted. He wanted to take it in order to leave,  
8 so as to escape going back to the Rome State School. The  
9 investigator was due there, as I understand it, the next morning.  
10 They come once a month from that school to check upon the  
11 activities of those who have been assigned out.

12 He awakened Mrs. Francisco for the purpose  
13 of obtaining the money which was rightfully his, and which he  
14 had a right to. Of course it was an unusual hour to do it,  
15 but he had returned home late, and he had been threatened with  
16 that other thing on the part of Mrs. Francisco of returning  
17 him to the Rome School. So I assume, putting all of those  
18 factors together, the one idea in his mind was to take his  
19 money and get away as far as he could to avoid being transferred  
20 back.

21 Now, Mrs. Francisco was awakened.  
22 Apparently he had stayed there in the house, and she had no  
23 fear of him because her bedroom was open. There was no door

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Minutes of Sentencing, June 15, 1965.

1 on it. No locks at all. So when he awakened her, instead of  
2 responding to him, she merely started to scream. Now, I assume  
3 if she had talked to him that night in a normal tone, this thing  
4 would never have happened. But the minute she screamed,  
5 of course with his uncontrollable and ungovernable temper, and  
6 the idea in mind of perhaps she may awaken the people who  
7 were living in the other apartment of the house---there was a  
8 man and his wife who were working there for Mrs. Francisco  
9 and living in the house---in order to stop the screaming and  
10 in the excitement and tension of it all, the assault occurred  
11 and as a result Mrs. Francisco met her death.

12 Now, I'm not trying to condone the actions  
13 that my client took on that night, and because of this, this  
14 lady's blood is on his hands, and society demands that he answer  
15 for it. And under the circumstances as we have them now,  
16 society demands an opportunity to see if they can punish this  
17 young man for what he has done, but also to reform him, if  
18 possible, so that perhaps sometime in the future, he may become  
19 a valuable adjunct to society.

20 Now, briefly, there was a flight, of  
21 course, afterwards. The amount of money involved was very small.  
22 In fact, it was trivial. But that, briefly, are the  
23 circumstances surrounding this, and I'm sure that your Honor

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1 must feel that on that night, when he entered Mrs. Francisco's  
2 bedroom, it was only for the purpose of obtaining the money  
3 that was his, and not for the purpose of provoking or engaging  
4 in an assault upon that lady.

5 It's a sad circumstance that it happened  
6 and we know that Mrs. Francisco died as a result of it. There  
7 was a subsequent flight and arrest in Elizabethtown, and we are  
8 in court now in the prisoner's dock to answer for the crime that  
9 was committed that night. He's only a young man, sir, and he  
10 was just 19 in May of this year, so that his whole life is  
11 ahead of him, and it's not a very pleasant thing to stand here  
12 representing somebody of that age, knowing full well that a  
13 great many years are going to pass before he is able to enjoy  
14 his freedom, to enjoy fresh air, to go to a moving picture, to  
15 attend a ballgame, and to come and go when he wants to. And  
16 there is not much pleasure in it for a defense counsel,  
17 realizing the circumstances and realizing that he must pay for  
18 what occurred that night.

19 But I do hope that the Court, in its wisdom  
20 and experience, will take into consideration the young man's  
21 age, his intelligence quotient, his background, and the circum-  
22 stances when you pass sentence upon him, and I trust that you  
23 will have mercy upon him to the extent that you feel the ends

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1 of justice will be met. Thank you.

2 THE COURT: We'll take the record now.

3 Now, I realize this defendant has a low I.Q. and I want to make  
4 sure that, if possible, that he understands all the questions  
5 and the history, and therefore, I'm asking your help, Mr.  
6 Reinhart, in helping the Clerk make out that history chart.  
7 And also I want, if he can't read it, after it's completed and  
8 before he signs it, I want to make sure that you, as his  
9 counsel, in front of the Clerk, read those questions and the  
10 answers to him so he can comprehend them before he signs it.

11 MR. REINHART: Very well, sir.

12 THEODORE GORDON MORGAN, the defendant  
13 herein, upon being duly sworn by the Clerk, testified as follows:

14 BY THE COURT CLERK:

15 Q Your name, please.

16 A Tim Morgan. Timothy Gordon Morgan.

17 Q And the indictment?

18 MR. REINHART: Murder in the First Degree.

19 Q And the plea is ---

20 MR. REINHART: The plea is Murder Second.

21 Q Your age.

22 A Nineteen.

23 Q Occupation?

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Timothy Gordon Morris

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1 MR. REINHART: Laborer.

2 Q Where were you born?

3 A Gloversville.

4 Q And your residence now?

5 A Fulton County Jail.

6 Q Citizen or subject of the United States?

7 MR. REINHART: Citizen.

8 Q Married or single.

9 A Single.

10 Q Religious instruction.

11 A Protestant.

12 Q And your education? How far did you go in school?

13 A Seventh grade.

14 Q Parents living or dead?

15 A One is living and one is dead. Mother is living.

16 MR. REINHART: And your father is dead.

17 A Yes.

18 Q Your habits of life---temperate or intemperate?

19 MR. REINHART: Temperate. You don't drink  
20 do you?

21 A No.

22 Q Ever before convicted of a crime?

23 A No.

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Timothy Gordon Morgan

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1 Q Counsel assigned?

2 MR. REINHART: Yes, Floyd J. Reinhart and  
3 Robert Best.

4 Q Do you waive any delay in the time for pronouncing judgment?

5 MR. REINHART: Yes.

6 A Yes.

7 Q Have you any legal cause to show why judgment should not be  
8 pronounced against you?

9 A No.

10 Q Have you learned or practiced any mechanical trade?

11 A No.

12 MR. REINHART: No, he's a farmer.

13 THE COURT: I'm sure there isn't any  
14 mistake on that, Mr. Reinhart, because we have a very competent  
15 Clerk, but still, before he signs that, I want you to read that  
16 over to him, and make sure that he understands it.

17 BY MR. REINHART:

18 Q Your name is Timothy Gordon Morgan.

19 A Right.

20 Q And you were indicted on Murder, First Degree.

21 A Right.

22 Q And you entered a plea of guilty to Murder in the Second  
23 Degree.

24 Yes.

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~~ONLY COPY AVAILABLE~~ Timothy Gordon Morgan

12

1 Q And you are a male. Of the male sex.

2 A Yes.

3 Q Your occupation---you were a laborer.

4 A Yes.

5 Q You were born in Gloversville, New York.

6 A Yes.

7 Q And you're a citizen of the United States because you were  
8 born here. Right?

9 A Right.

10 Q And you now live at the Fulton County Jail.

11 A Right.

12 Q You're single.

13 A (nods yes).

14 Q Your religious instruction is that of a Protestant.

15 A Yes.

16 Q And you went as far as the 7th Grade in your education.

17 A Yes.

18 Q Of your parents, your mother is living and your father is  
19 dead.

20 A Right.

21 Q Your habits of life are temperate.

22 A Yes.

23 Q You have never been convicted of a crime before, sir.

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Timothy Gordon Morgan

13

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1 A No.

2 Q Your lawyers were Floyd Reinhart and Robert Best.

3 A Yes.

4 Q You waive delay in pronouncing judgment, sir.

5 A Yes.

6 Q You haven't any legal cause to show why judgment should not  
7 be pronounced against you.

8 A No.

9 Q You never learned or practiced any mechanical trade, did you,  
10 sir.

11 A No.

12 MR. REINHART: All right.

13 (the defendant signed the examination)

14 (the defendant, together with his attorney, again appeared  
15 before the Court)16 MR. SCHLUSBERG: Your Honor, I am not  
17 going to spend a lot of time reciting some of the facts in this  
18 matter, because this defendant stands before you adjudicated and  
19 convicted of Murder in the Second Degree. I do want to say  
20 that I do not concur with many of the facts presented by  
21 counsel, and from the investigation and reports and psychiatric  
22 examinations submitted to your Honor, this man knew what he was  
23 doing on the day that he committed this crime. He knows what

## Minutes of Sentencing, June 15, 1965.

1 he is doing today, and is fully aware and capable of understand  
2 it.  
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3 I think that the crime he committed was a  
4 vicious one. Your Honor has a full and complete record and  
5 report, and I feel that such a sentence should be meted out  
6 to this defendant that will amply and sufficiently punish him  
7 for what did in taking the life of Ada Francisco, and that  
8 he be confined so that there will be no repetition by him  
9 and that your Honor impose such sentence as will be a deterrent  
10 to others. These things must stop. Your Honor, I respectfully  
11 move for sentence.

12 THE COURT: Have the record show that the  
13 Court has heretofore had the opportunity of studying the very  
14 voluminous record of the Rome State School in regard to Timothy  
15 Gordon Morgan, and the ample report of the Family Court of  
16 Fulton County, and the Probation Officer's report, which is  
17 at hand. I also have heard the history of the examination  
18 of the defendant under oath, and I heard the questions asked  
19 and the answers given, and I am of the opinion that Timothy  
20 Gordon Morgan understood the questions and gave and understood  
21 the answers, theretc. This is not a pleasant duty and it now  
22 has been for me, but it is one of the duties that must be a  
23 part of the position that I hold.

Minutes of Sentencing, June 15, 1965.

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At your request, Mr. Morgan, I appointed  
you two attorneys, Floyd Reinhart and Mr. Best, both of whom  
I considered to be perhaps the best qualified and best informed  
lawyers in this type of work in this area. I know they have  
given unstintingly of their time and effort to do the very  
best for you in your defense. Likewise, I am impressed  
by the work of the District Attorney and the Assistant District  
Attorney since this case began, and the many conferences I  
have had with both your attorneys and with the district attorney  
and the assistant district attorney. I feel that all of the  
authorities involved have given freely of their time and effort  
to present all the possible facts, psychological, social and  
legal data, and everything about your history from the time you  
were born. So I feel that I know you quite well.

I also want the record to show, of course,  
that I have at hand and have read the report of the psychiatrists  
at the Utica State Hospital, who, after three weeks of exami-  
nation of the defendant, came to the conclusion, in writing  
filed with the Court, that the defendant is sane and understands  
the nature of an oath or the charge against him, and is able to  
make his defense.

I believe, Mr. Morgan, that on more than  
one occasion, this Court has advised you of your right to a

Minutes of Sentencing, June 15, 1965.  
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1 trial, and informed you that a plea of guilty on your part to  
2 any crime was tantamount or the same as being tried by a jury  
3 and convicted at their hands. This is not an easy case to  
4 evaluate on the part of the People as well as on the part of the  
5 defense. I know it has given defendant's counsel considerable  
6 trouble, and I have given it considerable thought. I realize  
7 that, through no fault of yours, and certainly through no fault  
8 of anyone else living or dead, you happen to be a person in  
9 our society of 1965 who has a very low intelligence quotient.  
10 That is, your basic ability to understand is below average,  
11 considerably below average. You have been classified as a moron  
12 mentally, and I have taken that into consideration and weighed  
13 that in regard to your offense and your actions. Because of  
14 that, and because of your emotional instability, I have concluded  
15 that you should not have the sentence that I originally felt  
16 you deserved, a much higher one than I am going to give you  
17 today.

18 I know that your road in life, in prison,  
19 is going to be very difficult because of your mentality and  
20 your instability. It's going to be a very difficult time for  
21 you. On the other hand, you have taken a life, contrary to  
22 all law, both legal and moral, and for that you must be  
23 punished.

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Minutes of Sentencing, June 15, 1965.

Upon your personal plea, Timothy Gordon Morgan, of guilty to the crime of Murder in the Second Degree in connection with the indictment returned by the Grand Jury of Fulton County at the April 1965 Term of Supreme Court charging you with the crime of Murder First Degree arising out of the unlawful death of one, Ada Francisco, the Court hereby adjudges you to be guilty of Murder in the Second Degree.

And it is the judgment and sentence of this Court that you be confined in an institution, under the jurisdiction of the New York State Department of Correction, for an indeterminate term, the minimum of which shall not be less than 25 years, and the maximum of which shall be the remainder of your natural life. And it is the further direction of this Court that you be committed to the Elmira Reception Center and be dealt with according to the appropriate provisions of the law, in accordance with Article 3-a of the Correction Law of the State of New York.

You are now remanded to the Sheriff of Fulton County.

MR. REINHART: If it please the Court, there has been so much striving in the field of penology and sociology, and there are bills pending in the Legislature which I assume will be up for passage in the near future, which I want this defendant to have the benefit of in the event of an

## Minutes of Sentencing, June 15, 1965.

1 sentence revision. So I want to, in some way, protect his  
2 rights in the event there are any laws passed in the future  
3 which would tend to classify him in a different category than  
4 what he is in now. I don't know how to appropriately express  
5 it except that I would like to have the record show that I am  
6 aware of these things that are being done to classify and  
7 modify, and so I want the defendant to have the benefit of it.

8 THE COURT: Well, I think that is your  
9 duty, Mr. Reinhart, and of course it's very nebulous, as you  
10 say, at the present moment, and nobody knows exactly what is  
11 going to happen. But I would think that if that is done  
12 in all cases, it would have to be done in a retroactive way,  
13 and that being so, I am sure that they wouldn't make an  
14 exception to this case, or any other case. But I think that  
15 it's timely and correct that you make a notation on the record  
16 to protect whatever rights he has in that regard.

17 MR. REINHART: Thank you, Sir.

18 THE COURT: Any unfinished matters will  
19 be recessed to my Chambers in Lake Placid.

20

21

22

23

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OCT 3 1973

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

131a

Memorandum-Decision and Order, September 26, 1973.

Solicitor General  
DeLoach Clark

MR. HOFFMAN

UNITED STATES OF AMERICA ex rel. TIMOTHY  
G. MORGAN,

Releasor,

vs.

ROBERT J. HENDERSON, Superintendent,  
Auburn Correctional Facility,

Respondent.

EDMUND PORT, Judge

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73-CV

Memorandum-Decision and Order

The Clerk of the court has sent to me for my consideration a petition for a writ of federal habeas corpus, together with an affidavit in forma pauperis and for the assignment of counsel, from a state inmate presently confined in the Auburn Correctional Facility.

The relator alleges that he plead guilty in the Fulton County Supreme Court on June 8, 1965, to Murder 2nd degree and was sentenced on June 15, 1965, to a term of 25 years to life. No appeal was taken. Relator did bring a petition for a writ of error coram nobis in the Fulton County Supreme Court on the ground that the trial court, at the plea taking, failed to ascertain whether or not there was a factual basis for the plea. Specifically, relator alleges that the court made no attempt to ascertain whether or not the essential element of "a design to effect the death of the person killed" was present. Relator also alleged that the plea was not made with an understanding of the nature of the charges or the

Memorandum-Demand and Order, September 26, 1973.

consequences of the plea, due, in part, to his I.Q. which is alleged to be between 68-75. The writ was denied without a hearing on June 3, 1971. The Appellate Division affirmed without opinion. People v. Morgan, 38 App. Div. 2d 1012 (3rd Dept. 1972). Leave to appeal to the Court of Appeals was denied on July 6, 1972. The petitioner has supplied this court with copies of his brief and record on appeal, as well as the brief of the People.

Boykin v. Alabama, 395 U.S. 238 (1969) is not applicable to the instant case. See, e.g., United States ex rel. Rogers v. Adams, 435 F.2d 1372 (2d Cir. 1970). The standard to be applied to the guilty plea herein is whether Morgan made a reasoned choice, voluntarily after proper advice and with a full understanding of the consequences. See United States ex rel. Codarre v. Gilligan, 363 F.2d 961, 964 (2d Cir. 1966).

An examination of the record on appeal demonstrates a protective and solicitous attitude, on the behalf of the court, toward the defendant's interests. For instance, at the defendant's arraignment on April 15, 1965, in the Fulton County Supreme Court, the court appointed the two attorneys<sup>1</sup> that the defendant wished to represent him.<sup>2</sup> In addition, at arraignment, the court indicated every willingness to make itself and official records of the defendant readily available to defendant's counsel. The

1. Robert Best, Esq., and Floyd Reinhart, Esq. The latter was reported to have been one of the ablest and most competent trial attorneys in the area.

2. Minutes of Arraignment, P. 4.

Memorandum-Demand and Order, September 26, 1973.

court's concern regarding the defendant's background and its investigation of his circumstances and situation is further revealed in the trial judge's comments on the sentencing.<sup>4</sup>

On arraignment the indictment for Murder 1st degree was read to the defendant in the presence of his two attorneys, and the court explained to the defendant his right to a jury trial and to subpoena witnesses in his behalf and that a plea of guilty would be the same as being convicted after a trial by a jury.<sup>5</sup> The defendant affirmatively indicated that he understood what the court had told him.<sup>6</sup>

It should also be noted that a psychiatric examination of the defendant was ordered by the court, and that as a result thereof, he was found competent to stand trial, capable of understanding the charge against him, and of assisting in his defense.<sup>8</sup>

On the taking of the plea of guilty on June 8, 1965, the court made a special effort to emphasize to the defendant the gravity and importance of his change of plea.<sup>9</sup> The court asked the defendant whether he understood: a) that he was accused of killing the victim, b) that a plea of guilty was the same as being convicted after a jury trial of Murder 2nd degree, and c) that he would be sentenced to prison. The defendant answered in the affirmative to each of these questions.<sup>10</sup> In addition, the trial judge

- 
3. See Minutes of Arraignment, pp. 8-11.
  4. See Minutes of Sentence, pp 40-43.
  5. Minutes of Arraignment, p. 5.
  6. Minutes of Arraignment, pp. 5-7.
  7. Minutes of Arraignment, pp. 6-7
  8. See Plea Minutes, p. 18 and Sentence Minutes, p. 41.
  9. Plea Minutes, p. 9.
  10. See pages 21-23 of Sentence Minutes.
  11. I do.

Memorandum-Demand and Order, September 26, 1973.

asked the defendant if he fully understood what he was doing and if he was doing this voluntarily and upon the advice of <sup>12</sup> counsel; the defendant again responded in the affirmative.

Further, defendant's mother and two brothers were present <sup>13.</sup> with him in the courtroom when he changed his plea to guilty.

An examination of the sentence proceeding of June 15, 1965 easily reveals that the defendant's attorneys had made a full and complete investigation of the case before advising him to <sup>14</sup> plead guilty to the lesser charge.

Finally, it should be noted that petitioner did not raise any challenge to his plea until five years after he had been sentenced.

After an examination of all the papers herein and a consideration of all the circumstances surrounding the taking of the plea, I am convinced that Morgan made a reasoned choice; voluntarily and after proper advice from competent counsel, and with a recognition that said choice would result in a prison term. Therefore, I do not find that petitioner was deprived of due process of law and the petition herein will be denied and dismissed.

For the reasons herein, it is

ORDERED, that the petition herein be and the same hereby is denied and dismissed. Leave to proceed in forma pauperis is granted and the Clerk is directed to file the papers herein

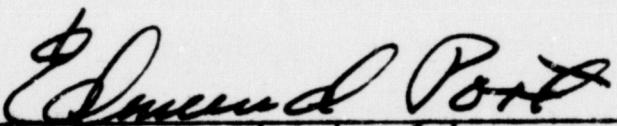
12. See page 23 of Plea Minutes.

13. See page 25 of Plea Minutes.

14. See page 28-35 of Sentence Minutes.

Memorandum-Decision and Order, September, 26, 1973.

without the payment of fees.

  
United States District Judge

Dated: September 26, 1973.  
Auburn, New York.



STATE OF NEW YORK )  
: SS.:  
COUNTY OF NEW YORK )

ANGELA FIORE , being duly sworn, deposes and  
says that she is employed in the office of the Attorney  
General of the State of New York, attorney for /  
herein. On the 14th day of March , 1975 , she served  
the annexed upon the following named person :

Mr. Joseph Lynch  
Noble, Leary, Leary & Lynch  
207 Metcalf Plaza  
144 Genesee Street  
Auburn, NY 13021

Attorney<sup>s</sup> in the within entitled proceeding by depositing  
a true and correct copy thereof, properly enclosed in a post-  
paid wrapper, in a post-office box regularly maintained by the  
Government of the United States at Two World Trade Center,  
New York, New York 10047, directed to said Attorney<sup>s</sup> at the  
address within the State designated by them for that  
purpose.

Sworn to before me this  
14 day of March , 1975

Ralph A. McCusker  
Assistant Attorney General  
of the State of New York



